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No. 91-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM H. DENNLER, *et al.*,

Petitioners,

v.

ROBERT S. TRIPPET, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM A. WINEBERG, ESQ.
MICHAEL R. SIMMONDS, ESQ.
BROAD, SCHULZ, LARSON & WINEBURG
One California Street
San Francisco, CA 94111
(415) 986-0300

*PETER VAN N. LOCKWOOD, ESQ.
ALBERT G. LAUBER, ESQ.
JILL R. SHELLOW, ESQ.
JOAN M. CANNY, ESQ.
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, DC 20005
(202) 862-5000

ELIHU INSELBUCH, ESQ.
CAPLIN & DRYSDALE, CHARTERED
10 East 53rd Street, 20th Floor
New York, New York 10022
(212) 319-7125

WILLIAM H. HINKLE, ESQ.
Suite 1100
320 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 584-6700

Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether Section 27A of the Securities Exchange Act of 1934, added by Section 476 of the FDIC Improvement Act of 1991, which renders this Court's decision in *Lampf, Pleva v. Gilbertson*, 111 S.Ct. 2773 (1991), non-retroactive in its application to Section 10(b) claims, requires reversal of the Tenth Circuit's judgment ordering dismissal of petitioners' Section 10(b) claims as time-barred, based on a retroactive application of *Lampf, Pleva*.

2. Whether, for purposes of the one-year limitations period of Section 13 of the Securities Act of 1933, a securities issuer's rescission offer implemented in settlement of an SEC enforcement action operates, as a matter of law, to put investors on notice of a wholly distinct fraudulent scheme perpetrated by the issuer, where (a) the limited violations of law alleged by the SEC have seemingly been cured by the rescission offer prospectus, (b) no other evidence of fraud by the issuer is apparent, and (c) the jury specifically found that such investors could not with reasonable diligence have discovered the fraud until 28 months later.

3. Whether the doctrine of equitable estoppel enunciated by this Court in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), is inapplicable as a matter of law to cases subject to Section 13 of the Securities Act of 1933.

PARTIES TO THE PROCEEDING

Petitioners in this Court are William H. Dennler, John D. Lockton, Peter G. Powers, Peter P. Luce, William D. Robertson, Thomas H. Thorner, William Grohne, Beatrice B. Warren, Joseph C. Bennett, Estate of Hoyt Ammidon, Fred J. Borch, Joseph A. Buda, Estate of Arthur M. Bueche, Estate of Thomas S. Gates, Hubert W. Gouldthorpe, Earl D. Hilburn, Joseph E. Horak, Francis K. McCune, Estate of J. Stanford Smith, and Hicks B. Waldron. The first nine petitioners named petition on their own behalf and as representatives of nine classes of investors certified by the trial court pursuant to Rule 23, Fed. R. Civ. P. Respondents in this Court (defendants-appellants below) are Robert S. Trippet, Frank E. Sims, Elmer M. Kunkel, Wynema A. Cross as Executrix of the Estate of Norman C. Cross, Jr., Cross & Company and Kothe & Eagleton, Inc. All other parties named in the caption of the opinion below (App. 1a-23a) are either defendants who have settled and been dismissed or plaintiffs who were either former class representatives or whose individual claims were dismissed voluntarily before trial.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	28

TABLE OF AUTHORITIES

CASES:	Page
Alberta Gas Chemicals, Ltd. v. Celanese Corp., 650 F.2d 9 (2d Cir. 1981)	27
Anderson v. City of Bessemer, 470 U.S. 564 (1985)	21
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	20
Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962)	20
Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875)	22
Bath v. Bushkin, Gaims, Gaines and Jonas, 913 F.2d 817 (10th Cir. 1990)	12
Bomba v. W. L. Belvidere, Inc., 579 F.2d 1067 (7th Cir. 1978)	24
Burke v. Gateway Clipper, Inc., 441 F.2d 946 (3d Cir. 1971)	24
Byers v. Burleson, 713 F.2d 856 (D.C. Cir. 1983)	21
Cange v. Stotler & Co., 826 F.2d 581 (7th Cir. 1987)	24
Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978)	21
Darms v. McCulloch Oil Corp., 720 F.2d 490 (8th Cir. 1983)	24
Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168 (10th Cir. 1974)	12
Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959)	23, 24, 27
Hackbart v. Holmes, 675 F.2d 1114 (10th Cir. 1982)	12
Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)	27
Holmberg v. Armbrecht, 327 U.S. 392 (1946)	22

Table of Authorities Continued

	Page
In re Data Access Systems Securities Litigation, 843 F.2d 1537, *cert. denied*, 488 U.S. 849 (1988)	12, 13
In re Home-Stake Production Co. Securities Litigation, 76 F.R.D. 351 (N.D. Okla. 1977)	7
Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir. 1969)	24
Kennedy v. Josephthal & Co., 814 F.2d 798 (1st Cir. 1987)	21
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991)	*passim*
Lavender v. Kurn, 327 U.S. 645 (1946)	20
Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984)	19, 21
Ott v. Midland-Ross Corp., 523 F.2d 1367 (6th Cir. 1975)	24
Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979)	14, 18, 20, 21
S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972)	27
Scarborough v. Atlantic Coast Line R.R., 178 F.2d 253 (4th Cir. 1949), *cert. denied*, 339 U.S. 919 (1950)	24
Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991)	22
State of Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981)	21
Tennant v. Peoria & P.U. Ry., 321 U.S. 29 (1944)	20
Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971)	27

Table of Authorities Continued

Page

United Business Communications, Inc. v. Racal-Milgo, Inc., 591 F. Supp. 1172 (D. Kan. 1984) 27

United States v. Fidelity & Deposit Co., 813 F.2d 697 (5th Cir. 1987) 24

United States v. Prince-McNemar Construction Corp., 320 F.2d 663 (9th Cir. 1963) 24

CONSTITUTION, STATUTES AND RULE:

U.S. Const., Amend. VII 20

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k ..... *passim*

Section 12(1) of the Securities Act of 1933, 15 U.S.C. § 77l(1) 24

Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m ..... *passim*

Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) 10, 15, 16, 22

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ..... *passim*

Section 27A of the Securities Exchange Act of 1934, added by Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991) ..... *passim*

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1711 24

28 U.S.C. § 1254(1) 2

SEC Rule 10b-5, 17 C.F.R. 240.10b-5 7

MISCELLANEOUS:

137 Cong. Rec. H11810-H11813 (daily ed. Nov. 26, 1991) (statements of Congressmen Dingell and Markey) 10

Table of Authorities Continued

Page

137 Cong. Rec. S17315 (daily ed. Nov. 21, 1991) (statement of Senator Riegle) 10

Bloomenthal, The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude, 60 U. Colo. L. Rev. 235, 291-292 (1989) ... 22, 23, 27

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-50a[1]) is reported at 939 F.2d 1420. The order denying petitioners' petition for rehearing and suggestion for rehearing en banc (App. 51a-55a) is reported at 947 F.2d 897. The order denying petitioners' motion to recall the mandate and for rehearing (App. 56a) is unreported. The order of the district court entered

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[1] App. refers to the separately bound appendix to this petition for a writ of certiorari.

October 17, 1988 rejecting respondents statute of limitations defenses (App. 57a-59a), and the final judgment of the district court entered November 16, 1989 (App. 60a-75a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1991 (App. 1a), and rehearing was denied on October 21, 1991 (App. 51a). By order dated December 30, 1991, Justice White extended the time within which to file a petition for a writ of certiorari to and including February 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution; Sections 11 and 13 of the Securities Act of 1933 ("the 1933 Act"), 15 U.S.C. §§ 77k and 77m; Sections 9(e) and 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. §§ 78i(e) and 78j(b); Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991); and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, are set out at App. 147a-155a.

STATEMENT

1. From 1964 through 1972, Home-Stake Production Company sold interests in annual oil and gas development programs to numerous investors

throughout the United States.[2] Each annual program was organized as a joint venture between the investors and a newly-created Home-Stake subsidiary (Joint Br., A-3, ¶¶ 69-71).[3] Home-Stake and its officers, particularly its chief executive officer, respondent Trippet, exercised complete control over these subsidiaries (Joint Br., A-3, ¶ 44). Although the subsidiaries nominally organized and operated the programs, they had no employees of their own.

Home-Stake registered with the SEC the interests offered to investors in each annual program (Joint Br., A-3, ¶ 71). The programs were sold pursuant to prospectuses that contained descriptions of mineral properties proposed to be developed, tables showing the purported results of prior programs, and audited financial statements of the offerors (Exs. RD 385-93). In addition, Home-Stake routinely furnished investors with copies of its annual reports, unregistered sales literature setting out projected investment returns, and, beginning in 1967, evaluation reports from purportedly independent petroleum geologists showing values for each annual program well in excess of its purchase price (T. 165-67, 223-25, 250-53, 1422-23; Exs. RD 1-8, RD 49-57, RD 318-83).

Unknown to investors, virtually none of the development work on any Home-Stake program ever took

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[2] Citations to the record below are as follows. A stipulation of undisputed facts among the parties, which was given to the jury, was attached to respondents' joint brief in the court of appeals and is cited as Joint Br., A-3, ¶ ___. The trial transcript is T. ___ and trial exhibits are Ex. ___. Pleadings filed in the district court are cited by docket number as Doc. ___.

[3] The dates and amounts of program interests purchased by the petitioners herein were stipulated. Joint Br., A-3, ¶¶ 1-37.

place (T. 423-32, 464-65, 505-15, 3351-55; Exs. 250, 292, 1254), and every program lost money continuously from its inception through the date of Home-Stake's bankruptcy in September 1973 (T. 1163-71; Exs. K-37A - K-42). Nevertheless, Home-Stake sent investors quarterly checks representing their purported share of profits from oil production, secretly charging those payments to the programs' development budgets (T. 742-48, 837-38, 1165-66, 1170, 1181, 1199). By using development monies to pay investors fictitious profits, Home-Stake in substance operated an elaborate Ponzi scheme in which funds invested in one program were returned either to those investors or to investors in prior programs (T. 1184-86, 1192, 1218).

Home-Stake disclosed none of its scheme to prospective investors, to the SEC or to the IRS (which would have disallowed the intangible drilling cost deductions that Home-Stake falsely advised investors they could claim). Instead, Home-Stake continually furnished its investors with fictitious production reports, bogus descriptions of drilling activities (Exs. RD 62-296; T. 233-38, 624-25, 1417), inflated program valuations (Exs. RD 318-83), and false audited financial statements showing increased income and net worth from mineral development (Exs. RD 48-57; T. 1198-1248). Home-Stake likewise filed fraudulent registration statements annually with the SEC, showing increased payouts of nonexistent oil revenues to investors in prior programs (T. 1171-79, 1242-43).

2. In 1970 the SEC learned that Home-Stake had sold more than the registered number of interests in its 1970 Program and had used, in selling those interests, an unregistered "program book" containing

unsupported income projections and reserve estimates (T. 1442-44, 1513-15). In February 1971, the SEC sued Home-Stake and certain of its officers, including respondents Trippet and Kunkel, its then chief financial officer, alleging violations of the registration and antifraud provisions of the securities laws (Ex. RD 657).[4] Specifically, the SEC challenged (a) the sale of more than the maximum number of 914 registered units in the 1970 Program; (b) unsupported estimates of oil reserves and future income for the 1970 Program in Venezuela; and (c) Home-Stake's failure to comply with an undertaking not to accept payment for units in the 1970 Program until a post-effective prospectus amendment was delivered to investors (*Id.*).

In April 1971, Home-Stake and its co-defendants agreed to settle the SEC suit by making a rescission offer to investors in the 1970 Program. The settlement was embodied in a consent decree whereby defendants agreed (a) to reduce the 1970 Program to its originally registered size; (b) to eliminate income projections for the 1970 Program and provide a reduced reserve estimate prepared by a petroleum engineer acceptable to the SEC; (c) to circulate to investors in the 1970 Program a revised prospectus accurately describing the program and the rescission offer; and (d) not to violate the securities laws in the future (Ex. RD 659). As ordered by the district court, the rescission offer prospectus was mailed to investors on April 30, 1971 (Ex. RD 410). Home-Stake subsequently advised the SEC that enough investors had

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[4] Respondents Cross and Sims were not sued by the SEC and respondents Kothe & Eagleton and Cross & Company had yet to provide any services to Home-Stake as of the SEC suit.

accepted the rescission offer to reduce the 1970 Program to its originally registered size, with more than 600 investors holding $18,280,000 of interests (914 units) electing to continue their investment (Ex. RD 386 at 43, Ex. 450B).

The 1971 SEC suit contained no allegations concerning Home-Stake's 1964-1969 Programs (which were located in California, not Venezuela), no allegations concerning any aspect of the Home-Stake Ponzi scheme, and no allegation of inaccuracies in Home-Stake's audited financial statements (Ex. RD 657). (In part, this was due to false and misleading information that respondents submitted to the SEC during its investigation (T. 1046, 1063-65; Exs. 2618, 2640, 3832).) In any event, the specific wrongs the SEC had alleged—oversales of interests in, and unsupported estimates of income and reserves for, the 1970 Program alone—were purportedly cured by the rescission offer prospectus, which was accepted by the SEC and the district court as satisfying the consent decree (Exs. RD 407, RD 410, RD 659).

Between early November and late December 1971, Home-Stake registered with the SEC and sold to more than 400 investors interests in a new 1971 Program (Ex. RD 386; Ex. 450B). Between early October and late December 1972, Home-Stake registered with the SEC and sold to more than 130 investors interests in its 1972 Program (Ex. RD 385; Schedules Attached To Final Judgment entered November 16, 1989, Vol. 2, 1972 Class). The prospectuses for the 1971-1972 Programs included a brief description of the SEC action, the ensuing consent decree, and the rescission offer for the 1970 Program (Exs. RD 385, RD

386). Neither prospectus disclosed Home-Stake's Ponzi scheme, which continued unabated (*Id.*).

3. On March 30, 1973, three investors (including Ivan Anixter, the original named plaintiff) brought this securities fraud class action against Home-Stake on behalf of investors in the 1965-1971 Programs. (Originally filed in California, the case was later transferred to the United States District Court for the Northern District of Oklahoma.) (App. 25a). In September 1973, the SEC sued Home-Stake and, for the first time, alleged the existence of the Home-Stake Ponzi scheme (N.D. Okla., Case No. 73-C-306, filed 9/11/73). In settlement of that SEC suit, on September 20, 1973, Home-Stake filed for reorganization under the bankruptcy laws (N.D. Okla., Case No. 73-B-922) (T. 3472). In May 1974, the *Anixter* complaint was amended by adding claims on behalf of investors in the 1964 and 1972 Programs, adding plaintiffs to represent those classes, and adding defendants including respondents Kothe & Eagleton, Inc. (securities counsel in the 1971 Program offering) and Cross & Company (auditors of the Home-Stake financial statements included in the 1972 Program prospectus) (Doc. 60).

In 1976, the *Anixter* suit was certified as a class action on behalf of nine separate classes, respectively comprising investors in each of Home-Stake's annual programs from 1964 through 1972. *In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 351 (N.D. Okla. 1977). Following a five-week jury trial in the summer of 1988, the jury found respondents liable for violations of Section 11 of the 1933 Act, Section 10(b) of the 1934 Act, and Rule 10b-5 thereunder (App. 60a-75a). The jury also answered two sets of

special interrogatories concerning the statute of limitations. First, the jury found that for each group of claims against each defendant, the applicable class representative did not discover, and with the exercise of reasonable diligence could not have discovered, the factual basis for his or her claim prior to September 1973, when the second SEC lawsuit was filed (App. 78a-146a). Second, the jury found that respondents Trippet, Kunkel and other Home-Stake officers intended to and did thwart the federal courts, the SEC and the IRS in the performance of their official duties (App. 76a-77a).

Based on these jury findings, the district court ruled that the *Anixter* actions were not barred by the applicable statutes of limitations (App. 57a-58a). In the alternative, based in part on the jury's finding that defendants had "intentionally thwarted and defeated the federal courts, the SEC and the IRS in their efforts to administer and enforce the laws of the United States," the court held that "defendants are estopped from raising statute of limitations defenses to the claims asserted against them" (App. 58a-59a).[5] In November 1989, following a three-day jury trial on damages, the district court entered judgments for petitioners and the classes they represent aggregating in excess of $130 million (App. 60a-75a).

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[5] The court made similar findings with respect to common-law negligence claims advanced in individual actions (the "*Anderson* actions") filed in April and May 1974 by those petitioners who are not *Anixter* class members. *See* App. 58a. Since the contentions of the individual petitioners generally track those of the class petitioners, we will, for reasons of simplicity, refer to them collectively as "petitioners."

4. The Tenth Circuit reversed, ruling that petitioners' claims were time-barred and directing the district court to dismiss the case (App. 1a-50a). With regard to petitioners' claims under Section 11 of the 1933 Act, the court ruled (a) that the claims of the 1964-1969 investor classes were barred by the "absolute" three-year statute of limitations contained in Section 13 of the 1933 Act; and (b) that the claims of the 1970-1972 investor classes were barred, "as a matter of law," by the one-year statute of limitations contained in Section 13, because investors in those programs were assertedly placed on "inquiry notice" of their claims in April 1971 by the SEC suit and rescission offer prospectus involving the 1970 Program (App. 32a-47a).

As for petitioners' claims under the 1934 Act, the Tenth Circuit ruled that, under this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991), petitioners' Section 10(b) claims were no longer governed by the applicable Oklahoma statute of limitations (two years from the date petitioners discovered or should have discovered the fraud). Rather, the Tenth Circuit held that *Lampf, Pleva* required petitioners' Section 10(b) claims to be assessed under the uniform federal statute of limitations set forth in Section 13 of the 1933 Act. Applying that Section's three-year and one-year limitations periods, the court of appeals ruled that the Section 10(b) claims of the 1964-1969 and the 1970-1972 investor classes were respectively time-barred (App. 47a-50a).

Supported by the SEC as amicus curiae, petitioners sought rehearing and rehearing en banc. The Tenth Circuit granted rehearing "in order to clarify [its]

prior opinion" in two respects (App. 52a). First, the court amended its discussion of Section 10(b), ruling that petitioners' claims thereunder were barred by the three-year/one-year limitations provisions of Section 9(e) of the 1934 Act, given the "substantial similarity" between Section 9(e) and Section 13 (App. 52a-54a). Second, the court expressly ruled that this Court's decision in *Lampf, Pleva* was to be applied retroactively (App. 54a-55a).

5. On December 19, 1991, the President signed into law the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (1991). Section 476 of that Act, 105 Stat. 2387, adds to the 1934 Act a new Section 27A. It provides in pertinent part that the limitations period for any pending Section 10(b) action commenced on or before June 19, 1991—the day prior to this Court's decision in *Lampf, Pleva*—"shall be the limitation period provided by the laws applicable in the jurisdiction * * * as such laws existed on June 19, 1991" (App. 154a). The stated purpose of Section 27A was to render this Court's decision in *Lampf, Pleva* nonretroactive in its application to Section 10(b) claims. *See* 137 Cong. Rec. H11810-H11813 (daily ed. Nov. 26, 1991) (statements of Congressmen Dingell and Markey); 137 Cong. Rec. S17315 (daily ed. Nov. 21, 1991) (statement of Senator Riegle).

On December 24, 1991, petitioners moved the Tenth Circuit to recall its mandate, grant rehearing to consider the effect of Section 27A, and reinstate their Section 10(b) claims and judgments. On January 6, 1992, the Tenth Circuit denied the motion without briefing, argument or opinion (App. 56a).

REASONS FOR GRANTING THE PETITION

1. Section 27A of the 1934 Act, enacted on December 19, 1991, plainly demands reversal of the Tenth Circuit's judgment in this case. Section 27A governs two categories of litigation. Section 27A(a), entitled "Effect on Pending Causes of Action," provides as follows (App. 154a):

> The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

Section 27A(b), entitled "Effect on Dismissed Causes of Action," covers cases brought on or before June 19, 1991, but "dismissed as time barred subsequent to" that date. It provides that, if such an action would have been filed timely under the principles of Section 27A(a), it "shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section" (App. 154a-155a).

The time to petition this Court for certiorari from the Tenth Circuit's judgment had not expired as of the date Section 27A was enacted, and this case has not yet been dismissed. It is therefore a "pending case" governed by Section 27A(a).[6] The statute of

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[6] Because the period prescribed by Section 27A(b) for moving to reinstate "dismissed causes of action" expires 60 days from the date of enactment, petitioners, in order to prevent any possibility of whipsaw, filed on January 10, 1992, a protective motion in the district court to reinstate their judgments pursuant to Section 27A.

limitations applicable to petitioners' Section 10(b) claims is thus the limitation period applicable under the law of the Tenth Circuit as such law existed the day before *Lampf, Pleva* was decided.

Prior to *Lampf, Pleva*, the limitations period for Section 10(b) claims in the Tenth Circuit was "the appropriate limitations statute of the state in which the alleged violation occurred." *Hackbart v. Holmes*, 675 F.2d 1114, 1120 (10th Cir. 1982). For cases from Oklahoma, such as this one, the Tenth Circuit applied the Oklahoma two-year statute of limitations. *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir. 1974). Whatever the length of the relevant state statute, the Tenth Circuit held that "the limitations period is tolled until the aggrieved party learns of the fraud or should have discovered it by the exercise of reasonable diligence." *Hackbart*, 675 F.2d at 1120.

The Tenth Circuit reaffirmed these principles shortly before deciding the instant appeal. *See Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817 (10th Cir. 1990). In *Bath*, the Tenth Circuit was invited to abandon reference to state statutes of limitations in Section 10(b) cases, and instead to adopt the federal limitations period first enunciated by the Third Circuit in *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, *cert. denied*, 488 U.S. 849 (1988). In August 1990, less than a year before *Lampf, Pleva*, the Tenth Circuit explicitly declined that invitation. *Bath*, 913 F.2d at 818-819. Thus, the statute of limitations applicable to petitioners' Section 10(b) claims, under Tenth Circuit law as it existed on June 19, 1991, was two years from the date petitioners learned of or should have discovered the fraud perpetrated upon them. By virtue of

Section 27A, that limitations period is now applicable to petitioners' Section 10(b) claims notwithstanding *Lampf, Pleva.*[7]

Under the statute of limitations that Congress has decided shall govern this case, petitioners' Section 10(b) claims were timely filed. At trial, the jury found as a fact that petitioners in the exercise of reasonable diligence could not have discovered their claims against respondents before September 1973 (App. 78a-146a). Counting from that date, the claims of all petitioners against all respondents were timely, the last complaint having been filed on May 24, 1974.

Notwithstanding this jury finding, the Tenth Circuit determined that "the one-year discovery period must begin to run from April 30, 1971," as a result of the SEC enforcement action involving only the 1970 Program and Home-Stake's subsequent rescission offer (App. 47a). Even under that determination—the error of which we demonstrate below, in our discussion of the second question presented—most or all of petitioners' Section 10(b) claims would be timely. Almost without exception, such claims were filed within two years of (i) April 30, 1971, or (ii) the date on which the securities in question were first offered and sold.[8]

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[7] Because the Tenth Circuit, unlike the Second, Third and Seventh Circuits, had not adopted as of June 19, 1991, the three-year/one-year federal limitations period first recognized in *In Re Data Access, supra*, the reference in Section 27A(a) to "principles of retroactivity" has no application here.

[8] The Section 10(b) claims against respondents Trippet, Kunkel and Cross for all investor classes were filed in March 1973. The Section 10(b) claims of the 1972 investor class against respondent

In sum, the Tenth Circuit's decision ordering the dismissal of petitioners' Section 10(b) claims cannot stand in light of Congress' enactment of Section 27A. Its decision should therefore be vacated and the case remanded for reconsideration in light of the new law. The Court may wish to consider summary action.[9]

2. The Tenth Circuit likewise erred in its application of "inquiry notice" principles to bar the claims of investors in the 1970-1972 Programs under Section 11 of the 1933 Act. At trial, the jury specifically found that petitioners, in the exercise of reasonable diligence, could not have discovered the facts underlying Home-Stake's Ponzi scheme prior to September 1973. The Tenth Circuit overturned the jury's finding, rul-

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Cross & Company were filed in May 1974, within two years of the date (November 1972) when interests in the 1972 Program were first offered and sold. The Section 10(b) claims of the 1971 investor class against respondent Kothe & Eagleton (a law firm which had not been involved in any prior Home-Stake securities offering) were filed on May 24, 1974. There is no evidence in the record from which a trier of fact could conclude that a 1971 class member, placed on inquiry notice by a single paragraph in the 1971 Program prospectus describing the earlier SEC action and court-ordered rescission offer involving the 1970 Program, could have discovered, through the exercise of reasonable diligence, either Home-Stake's fraudulent sale of the 1971 Program or Kothe & Eagleton's role in that fraud between November 1971 (when interests in the 1971 Program were sold) and May 24, 1972. *Compare Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979).

[9] Congress enacted Section 27A on the premise that the Court's decision in *Lampf, Pleva* would apply retroactively. Obviously, were the Court to determine that its decision in *Lampf, Pleva* should not be applied retroactively to pending cases, the Tenth Circuit's decision should be reversed on the merits, without regard to Section 27A.

ing, as a matter of law, that petitioners were on "inquiry notice" of the fraud practiced upon them as of April 30, 1971. That was the date on which Home-Stake's rescission offer prospectus, disclosing the first SEC suit and subsequent consent decree, was mailed to investors in the 1970 Program.[10] According to the Tenth Circuit, the SEC complaint and rescission remedy represented " 'great glowering clouds' * * * sufficient to put plaintiffs on notice that something was amiss" (App. 43a). "However incomplete that notice might have been," the court ruled, "it encompassed enough of a 'storm warning' to start the clock as a matter of law" (App. 47a). The court accordingly held that the Section 11 claims of the 1970-1972 Program investors, filed on March 30, 1973, were time-barred by the one-year limitations period of Section 13.[11]

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[10] A literal application of the Tenth Circuit's holding to the 1971 and 1972 investor classes would result in the former being deemed to have "inquiry notice" of Home-Stake's fraud six months before they bought their securities, and in the latter being *time-barred* before they made their initial investments.

[11] The Tenth Circuit initially ruled that these investors' Section 10(b) claims, as well their Section 11 claims, were controlled by Section 13 and time-barred for that reason. On rehearing, petitioners and the SEC pointed out that Section 9(e) of the 1934 Act governs Section 10(b) claims (*see Lampf, Pleva*, 111 S.Ct. at 2782 n.9), and that Section 9(e)'s one-year statute is triggered by the date of actual discovery, not (as under Section 13) by the date a violation should have been discovered by the exercise of reasonable diligence. The Tenth Circuit on rehearing then "clarified" its original opinion and held that, notwithstanding Congress's deliberate omission of "reasonable diligence" language from Section 9(e), the two Sections should be construed identically; this holding was based on the Tenth Circuit's belief that *Lampf, Pleva* (which did not discuss this issue) mandates a uniform standard (App. 52a-54a). While the Tenth Circuit's

The court of appeals plainly erred in ignoring the express findings of the jury and the district court and substituting its own view of the inferences to be drawn from the SEC enforcement action. The February 1971 SEC suit related solely to the offering and sale of units in Home-Stake's 1970 Program. That suit contained no allegations about Home-Stake's 1964-1969 Programs, no allegations about Home-Stake's 1971-1972 Programs (which did not yet exist), and no allegations about any aspect of the Ponzi scheme that forms the basis of petitioners' case.[12] The SEC action was settled by Home-Stake's circulation of a rescission offer prospectus which to all appearances cured the limited violations—oversales of units in, and overestimates of reserves and income from, the 1970 Program—of which the SEC had complained.

In determining that the 1971 SEC litigation put investors on notice of the wholly distinct fraud alleged here, the Tenth Circuit in effect holds that once an investor learns that the SEC has compelled an issuer to correct a securities law violation, that investor is on notice, as a matter of law, that any subsequent securities offering by that or any related issuer may

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decision on this point is erroneous and will serve as a pernicious precedent for Section 10(b) cases filed after June 19, 1991. Congress's enactment of Section 27A, discussed above, moots the Section 9(e) issue in this case.

[12] Indeed, respondents Kothe & Eagleton and Cross & Company had not been retained by Home-Stake nor had they performed any services for any Home-Stake company at the time of the SEC suit. While respondent Norman Cross was the auditor for Home-Stake in connection with its 1969 and 1970 programs, he was not implicated in the 1971 SEC suit. Cross did, however, provide false audited financial statements which were included in the rescission offer prospectus.

well be fraudulent. According to the Tenth Circuit, a securities law violation is a sort of original sin that taints an issuer's securities indefinitely. Any investor contemplating the purchase of a subsequent issue has only one year to investigate the possibility of fraud in connection with such later offering, even if the issuer has corrected its prior violation to the satisfaction of the SEC and the courts and there are no other facts suggesting fraud in the subsequent offering.

This holding flies in the face of common sense, subverts the policies of the federal securities laws, and improperly invades the province of the jury. In settling the 1971 SEC suit, Home-Stake agreed to correct all violations alleged by the SEC and to abide by a court injunction against future violations, breach of which was punishable by criminal contempt. Confronted with these facts, a rational investor could reasonably infer that Home-Stake's wrongdoing had been identified and cured. Indeed, more than 600 investors in the 1970 Program declined Home-Stake's rescission offer, and more than 500 persons subsequently opted to invest in its 1971-1972 Programs. And even if an investor could plausibly have read the SEC and court-approved rescission offer prospectus as the work of a chronic, rather than a repentant, sinner, the Tenth Circuit wholly failed to explain why that inference was so compelling that it was, as a matter of law, the *only* inference a trier of fact could permissibly draw.

The practical effects of the Tenth Circuit's decision will seriously compromise the policies of the federal securities laws. Any investor who purchases securities from an issuer that previously signed an SEC consent

decree will be deemed on "inquiry notice" of fraud from the moment of his purchase, leaving him just 12 months to investigate the possibility of fraud and bring suit if fraud is discovered. The virtual impossibility of an investor's meeting this deadline is shown by the record of this case. Following the April 1971 consent decree, it took the SEC, which has broad subpoena powers and a large staff of trained investigators, approximately $2^1/_2$ years to discover Home-Stake's Ponzi scheme and challenge it in court.

Given the unreasonableness of the Tenth Circuit's discovery deadline, investors will have strong incentives to avoid securities of issuers who have previously been the subject of SEC enforcement actions. The decision will thus impede free access to the capital markets by investors and issuers alike. To avoid jeopardizing their future securities offerings, issuers will have strong incentives not to settle cases with the SEC, conscious that a consent decree can become an indelible badge of fraud. And the practical consequences of the Tenth Circuit's holding, as the SEC explained in urging rehearing below, are even more unfortunate where the issuer is dishonest: "[T]he panel's holding, perversely and ironically, allows persons who have previously violated the securities laws and do so again to take advantage of a shorter statute of limitations than first-time wrongdoers" (SEC Amicus Br. 5 (filed Aug. 27, 1991)).

In holding that an SEC action puts investors on inquiry notice, as a matter of law, of unrelated frauds not alleged by the SEC, the decision below conflicts with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979). An investor there sued accountants in July 1977 for

falsely certifying an issuer's financial statements. The accountants raised in defense the applicable state two-year statute of limitations, contending that the investor was put on inquiry notice in June 1974, w' en the SEC brought market manipulation charges ag inst the underwriters of the issuer's securities (609 F.2d at 588-589). The Second Circuit reversed the district court's dismissal of the complaint, holding that, because of conflicting inferences that could be drawn from these undisputed facts, summary judgment on the statute-of-limitations issue was improper (*id.* at 592-593). In so holding, the court emphasized that the SEC's June 1974 order had alleged no fraud by the accounting firm and that "it was not until 1976 that the SEC was able to name these accountants as participants in the fraud" (*id.* at 592). In direct conflict with the Tenth Circuit's holding here, the Second Circuit stated (*ibid.*):

> If the SEC with its commendable expertise and specialized investigative teams was unable to discover the complicity of these accountants until shortly before its Opinion and Order of September 1, 1976 was released, it cannot be said as a matter of law that appellant should have discovered their participation any earlier.

The Tenth Circuit's decision also conflicts with well-established principles governing appellate review of jury verdicts in securities law cases. The issue of when an investor should discover, in the exercise of reasonable diligence, a misstatement or omission in a securities offering, is generally a question of fact for the jury. *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir.), *cert. denied*, 469 U.S.

932 (1984); *Robertson, supra*, 609 F.2d at 592-593. A court of appeals is barred by the Seventh Amendment from redetermining facts found by a jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-359 (1962). It is for the jury to judge the credibility of witnesses, weigh conflicting evidence, draw reasonable inferences from undisputed facts, and arrive at a conclusion. *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944).

Here the jurors saw the SEC's 1971 complaint, the ensuing consent decree, and Home-Stake's rescission offer prospectus. The jurors heard testimony from the 1970-1972 class representatives concerning their understanding of those events. And the jurors heard arguments from respondents' counsel urging the jury to draw the very inferences that the Tenth Circuit ultimately drew. The jury, however, found in answers to special interrogatories that the 1970-1972 class representatives neither discovered nor should have discovered the fraud in question until September 1973.[13]

For the Tenth Circuit to overturn this finding and resolve the notice issue as a matter of law was a usurpation of the jury's constitutional role as finder of the facts. This Court has repeatedly recognized that "the drawing of legitimate inferences from the facts are jury functions." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *Accord Lavender v. Kurn*, 327 U.S. 645, 652-653 (1946).[14] And both the

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[13] Respondents below challenged neither the jury instructions concerning the statute of limitations nor the form of the special jury interrogatories.

[14] This Court has held that an appellate court must defer to the factfinder's role in drawing inferences from evidence even

Second and the Ninth Circuits have specifically held that the question whether a plaintiff has exercised reasonable diligence in discovering fraud for statute of limitations purposes, where conflicting inferences may be drawn from otherwise undisputed facts, is a fact question to be decided by the jury. *Robertson v. Seidman & Seidman*, *supra*, 609 F.2d at 592-593; *Mosesian v. Peat, Marwick, Mitchell & Co.*, *supra*, 727 F.2d at 879. *Compare Byers v. Burleson*, 713 F.2d 856, 861-862 (D.C. Cir. 1983) (application of discovery rule in medical malpractice case).[15]

3. The Tenth Circuit also erred in its holding concerning equitable estoppel. In considering the timeliness of the Section 11 claims of the 1964-1969 investor classes, the court of appeals held that the doctrine of equitable estoppel, applied by the district court to bar respondents' reliance on the statute of limitations, "is not available to avoid the statute of repose established by Section 13" (App. 38a). The Tenth Circuit characterized Section 13 as erecting an

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where the inference is drawn by the district court, whose determinations are subject to the more lenient "clearly erroneous" standard of review. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-574 (1985).

[15] The cases that the Tenth Circuit cites to support its result involve situations where the plaintiffs at an early date had knowledge of substantially the same facts upon which they later based their claims. *See Kennedy v. Josephthal & Co.*, 814 F.2d 798 (1st Cir. 1987); *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978). Here, by contrast, the 1971 SEC action and ensuing consent decree were entirely distinct from the fraudulent scheme that was the basis for the judgments overturned by the Tenth Circuit.

"absolute bar" to Section 11 claims brought more than three years after the purchase of securities, citing dictum to this effect in *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991).[16]

In so holding, the Tenth Circuit refused to recognize the distinction, articulated in decisions of this Court and others, between equitable *tolling* and equitable *estoppel*. Equitable tolling is a doctrine which holds that "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the [limitations] statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1875). *See also Holmberg v. Armbrecht*, 327 U.S. 392, 396-397 (1946). Because the one-year period of Section 9(e) of the 1934 Act is based on discovery of the facts constituting the fraud, this Court held in *Lampf, Pleva* that the three-year period of Section 9(e) is "a period of repose inconsistent with tolling" (111 S.Ct. at 2782). By a parity of reasoning, that conclusion also applies to Section 13 of the 1933 Act.

In contrast, equitable *estoppel* operates to prevent a defendant from raising an otherwise dispositive statute-of-limitations defense because of his inequitable conduct after the initial tort. *See* Bloomenthal,

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[16] The Tenth Circuit made the same ruling with respect to the Section 10(b) claims of the 1964-1969 classes on the basis of the three-year limitations period of Section 9(e) of the 1934 Act. App. 47a-50a.

The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude, 60 U. Colo. L. Rev. 235, 291-292 (1989). This Court applied the doctrine in an FELA case to estop a defendant from relying on a three-year statute of limitations, noting that the defendant had fraudulently induced the plaintiff not to sue within the time prescribed by law. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). The Court explained that equitable estoppel springs from "the maxim that no man may take advantage of his own wrong," a "deeply rooted" principle that "has frequently been employed to bar inequitable reliance on statutes of limitations" (395 U.S. at 232-233).

Addressing the three-year limitations period at issue here, Professor Bloomenthal has explained that

> Equitable estoppel, properly understood, is not inconsistent with the fact that Congress intended the periods of limitation to be absolute. The Congress was attempting to assure directors and others that, after a period of time, no action would be brought against them for allegedly false statements made in a registration statement or otherwise in connection with the sale or purchase of a security. Congress was not saying that by their own subsequent conduct they could not, in effect, extend the period of limitation. It is critical, however, to the application of such doctrine that it be some act other than the events that constitute the basis for the claim that reasonably caused the plaintiff to forbear from asserting his claim.

Bloomenthal, *supra*, 60 U. Colo. L. Rev. at 292.

Thus, in interpreting the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. § 1711, which contains a three-year statute of limitations substantially identical to that of Section 13, the Seventh Circuit applied *Glus* to hold that a defendant could be equitably estopped from relying on a limitations defense, notwithstanding that equitable tolling was unavailable. *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978). And the Second Circuit applied equitable estoppel to prevent a defendant from relying on Section 13's requirement that a Section 12(1) action be brought within one year after the underlying violation was committed. *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1054-1055 (2d Cir. 1969).[17]

In this case, respondents committed numerous independent fraudulent acts over the nine years from 1965 to 1973 to prevent both petitioners and the members of the investor classes they represent, as well as the SEC, the IRS and the federal courts, from discovering the initial fraud in the sale of the Home-

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[17] Equitable estoppel has been applied by the courts of appeals, in a variety of contexts, to prevent defendants from enjoying the benefit of the running of a statute of limitations procured by fraud. *E.g.*, *Cange v. Stotler & Co.*, 826 F.2d 581, 587 (7th Cir. 1987) (Commodity Exchange Act); *United States v. Fidelity & Deposit Co.*, 813 F.2d 697, 700 (5th Cir. 1987) (Miller Act); *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) (ILSFDA); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975) (ADEA); *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946, 948 (3d Cir. 1971) (Jones Act); *United States v. Prince-McNemar Construction Corp.*, 320 F.2d 663, 665-666 (9th Cir. 1963) (Miller Act); *Scarborough v. Atlantic Coast Line R.R.*, 178 F.2d 253, 258 (4th Cir. 1949), *cert. denied*, 339 U.S. 919 (1950) (FELA).

Stake 1964 through 1969 Programs. For example, respondent Trippet personally directed the making of Ponzi payments by Home-Stake every quarter through February of 1973 to conceal the absence of program development and the lack of profitable operations (T. 742-46, 837-38). Trippet and respondent Sims authored the fictitious program operations reports mailed monthly or quarterly to investors (T. 233-38, 624-25, 1416-20). Trippet also orchestrated the annual preparation and distribution to investors of fraudulent valuation reports on the 1964 through 1969 Programs (T. 1421-25) and, over the years, authored literally hundreds of letters to class members providing false answers to questions raised by them concerning program distributions and operations (*E.g.*, Exs. 179, 911, 1731, 3182, 3386, 5052). Respondents Kunkel and Cross participated in the preparation and dissemination to 1964 through 1969 investors of fraudulent financial statements contained in Home-Stake's annual reports from 1964 through 1972 (Exs. RD 48-57).

In addition, from 1964 through 1972, each successive program registration statement was submitted to the SEC with false and misleading information about Home-Stake and its prior programs (*E.g.*, Exs. RD 394-430). Moreover, equally false annual reports on Form 10-K for each program were likewise filed with the SEC for each year (Exs. RD 485-504). Respondents Trippet, Sims, Kunkel and Cross either signed those fraudulent filings or audited false financial statements contained therein.[18] Finally, in con-

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[18] During the 1970-71 SEC investigation of Home-Stake, respondent Kunkel testified falsely under oath to the SEC about a purportedly independent equipment supplier (which was in fact

nection with the 1970 Program rescission offer, respondents Trippet, Sims, Kunkel and Cross misled investors, the SEC and the federal district court in 1971 by preparing and disseminating the fraudulent rescission offer prospectus (which included false Home-Stake financial statements) in blatant violation of the consent decree thereby continuing the concealment from all parties of the Home-Stake Ponzi scheme.[19]

Based on this conduct, the jury answered special interrogatories finding that Home-Stake and its officers (including respondents Trippet and Kunkel), intentionally prevented the SEC, the IRS, and the federal courts from discovering the fraudulent sales of securities of which petitioners complain (App. 76a-77a). The trial court concurred and ruled that defendants were equitably estopped from raising statute of limitations defenses to petitioners' Section 11 and Section 10(b) claims (App. 58a-59a). The Tenth Circuit did not dispute that the evidence of defendants' fraudulent post-sale conduct summarized above and the jury's findings based thereon laid the factual predicate for the district court's invocation of equitable estoppel. Rather, the court held the doctrine inapplicable as a matter of law, asserting that its invocation here would "operate[ ] to trump a clear outer limit intended by Congress" (App. 38a). Yet as

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a sham corporation organized by Trippet to defraud investors and the IRS) (Ex. 2618) and made false written representations to the SEC about the value of Home-Stake's major asset (a worthless multi-million dollar receivable) (Ex. 2640).

[19] Three years earlier, Trippet had secretly settled a securities fraud class action in violation of Rule 23(e), Fed. R. Civ. P. (App. 26a n.2).

Professor Bloomenthal has pointed out, "the legislative history [of the 1933 Act] makes it clear that Congress intended the absolute bar to relate to the fraud itself and not to subsequent steps to conceal it." Bloomenthal, *supra*, 60 U. Colo. L. Rev. at 294.[20]

In sum, the Tenth Circuit has interpreted Section 13 to bar the application of equitable estoppel principles in a manner that conflicts both with this Court's decision in *Glus* and with the decisions of other circuits interpreting statutes of limitation having comparable language and purpose. In effect, the Tenth Circuit has turned an ancient adage on its head and adopted the principle that, for cases under Section 13, two wrongs make a right for defendants. Certiorari should be granted to correct the court of appeals' error which, if allowed to stand, would unjustifiably reward securities law violators for their

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[20] The policy of "repose" weighted so heavily by the Tenth Circuit is no more important than the policy of "finality of judgments." Yet this Court has held that the finality of a judgment must give way to the equitable power of a court to prevent a party from taking advantage of fraud. Thus, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-246 (1944), the Court used its equity power to vacate a final judgment for patent infringement procured by a party through "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." Accord, *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 15 (1972). Application of this equitable power, moreover, is not confined to situations involving fraud on the courts. *See Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9, 13 (2d Cir. 1981) (vacating administrative decisions procured by fraud on agency); *Toscano v. Commissioner*, 441 F.2d 930 (9th Cir. 1971) (sanctioning fraud on the IRS and the Tax Court); *United Business Communications, Inc. v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1187-1188 (D. Kan. 1984) (vacating prior judgment).

success in concealing from investors and government agencies their fraudulent sales of securities.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM A. WINEBERG, ESQ.
MICHAEL R. SIMMONDS, ESQ.
BROAD, SCHULZ, LARSON & WINEBERG
One California Street
San Francisco, CA 94111
(415) 986-0300

*PETER VAN N. LOCKWOOD, ESQ.
ALBERT G. LAUBER, ESQ.
JILL R. SHELLOW, ESQ.
JOAN M. CANNY, ESQ.
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, DC 20005
(202) 862-5000

ELIHU INSELBUCH, ESQ.
CAPLIN & DRYSDALE, CHARTERED
10 East 53rd Street, 20th Floor
New York, New York, 10022
(212) 319-7125

WILLIAM H. HINKLE, ESQ.
Suite 1100
320 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 584-6700

*Counsel of record.

February 19, 1992

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91-1340

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM H. DENNLER, *et al.*,

Petitioners,

v.

ROBERT S. TRIPPET, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM A. WINEBERG, ESQ.
MICHAEL R. SIMMONDS, ESQ.
BROAD, SCHULZ, LARSON & WINEBURG
One California Street
San Francisco, CA 94111
(415) 986-0300

*PETER VAN N. LOCKWOOD, ESQ.
ALBERT G. LAUBER, ESQ.
JILL R. SHELLOW, ESQ.
JOAN M. CANNY, ESQ.
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, DC 20005
(202) 862-5000

ELIHU INSELBUCH, ESQ.
CAPLIN & DRYSDALE, CHARTERED
10 East 53rd Street, 20th Floor
New York, New York 10022
(212) 319-7125

WILLIAM H. HINKLE, ESQ.
Suite 1100
320 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 584-6700

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
Appendix A (court of appeals' opinion filed 7/22/91)	1a
Appendix B (court of appeals' order denying rehearing filed 10/21/91)	51a
Appendix C (court of appeals' order denying motion to recall mandate dated 1/6/92)	56a
Appendix D (district court's order entered 10/17/88)	57a
Appendix E (district court's final judgment entered 11/16/89)	60a
Appendix F (special jury interrogatories—equitable estoppel, entered 9/2/88)	76a
Appendix G (special jury interrogatories on statutes of limitations, entered 9/2/88)	78a
Appendix H (constitutional, statutory and regulatory provisions involved)	147a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90-5040

IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD,

Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; NORMAN C. CROSS, JR.,

Defendants-Appellants.

No. 90-5041

A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. and Helen Burgess; DEWEY J. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B. COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARFF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; E. STARR; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR., TED B. WESTFALL,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFEE, TAFT, MARK, BOND, RUCKS,

AND WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns,

Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; NORMAN C. CROSS, JR.,

Defendants-Appellants.

No. 90-5042

A.M. ANDERSON; RICHARD J. ANTON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, E.P. Bernuth, Sophie K. Bernuth, Joseph A. Buda, George and Helen Burgess; DEWEY CALI; ROBERT B. COBURN; COBURN & LIBBY, INC.; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; MARGARET C. EVERETT; L.L. FERGUSON; ISADOR H. FINKELSTEIN; H.W. GOULDTHORPE; GEORGE L. HALLER; JACK HANSON; RALPH HART; F.H. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; HOWARD G. KICHERER; ELIZABETH C. KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL MCFALL; JAMES F. MADDEN; ALBERT MANGANELLI; NICHOLAS MARCHESE; STANLEY A. MARKS; C.W. MOELLER; WILLIAM H. MORTENSEN; CARL OLSON; PATRICIA) OLSON; CARL PALERMO; FRANK PALERMO; ROY T. PARKER; HELEN M. REEDER; D.D. SCARFF; M.L. SCARFF; RICHARD SCOTT; LOUIS P. SINGER; WILLIAM R. SMART; J. STANFORD SMITH; G. CURTIS STEWART; PAUL TOWNSEND; VERNON UNDERWOOD;

TED B. WESTFALL; J. HOWARD WOOD; SIDNEY WOOLWICH; MURRAY ZIMMERMAN,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH, JR.; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,
Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of NORMAN C. CROSS, JR.,
Defendant-Appellant.

90-5043

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Marcella McHenry, Merl McHenry, Fred J. Borch, David Breslauer, Joseph A. Buda; DEWEY CALI; JAMES CLARK; MARY CLARK; WILLIAM H. COLQUHOUN; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; L.L. FERGUSON; JACK FINE; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; JAMES J. HAYES; EARL D. HILBURN; DOROTHY C. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; JOHN E. HUTCHINSON, III; HAROLD KAPLAN; W.S. JONES; HOWARD G. KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; D.W. LYNCH; D.B.

LYNCH, DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; ANTHONY MACAGNA; JAMES F. MADDEN; ALBERT MANGANELLI; NICOLAS A. MARCHESE; CHARLES J. MELOUN; C.W. MOELLER; CARL J. OLSON; PATRICIA OLSON; THOMAS O. PAINE; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; HOWARD RUBENSTEIN; D.D. SCARFF; M.L. SCARFF; C.S. SEMPLE; WILLIAM SMART; J. STANFORD SMITH; JANET G. STEWART; GERALD TOOMEY; OLIVER J. TROSTER; H.B. WALDRON, JR.; HUMBERTO. ZAVALETA; MURRAY ZIMMERMAN,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM BLUM; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFFE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,

Defendants,

and

WYNEMA ANNA CROSS, as Executrix of the Estate of NORMAN C. CROSS, JR.,

Defendant-Appellant.

No. 90-5044

IVAN A. ANIXTER; WILLIAM H. DENNLER; JOHN D. LOCKTON; FRANCIS K. MCCUNE; TED B. WESTFALL; WILLIAM H. MORTENSEN; PETER P. LUCE; WILLIAM D. ROBERTSON; BERNARD D. BROEKER; THOMAS H. THORNER; DOLLY YOSHIDA MARTIN; WILLIAM GROHNE; JAMES H. LEACHMAN; BEVERLY H. WARREN; JOSEPH C. BENNETT,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1964 PROGRAM OPERATING CORPORATION; HOME-STATE 1965 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1972 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; H.L. FITZGERALD; H.R SMITH; FRANK E. SIMS; JOHN T. LENOIR; THOMAS A. LANDRITH; E.M. KUNKEL; JACKSON M. BARTON; MARVIN R. BARNETT; DONALD C. LARRABEE; J.D. METCALFE; H.B. GUTELIUS; CARL A. CLAY; WILLIAM E. MURRAY; MURRAY, PATTERSON & SHARPE; DRYFOOS & COMPANY; MCAFEE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF; SIMPSON THACHER AND BARTLETT; HARRY HELLER; WILLIAM BLUM; RICHARD A.

GANONG; WILLIAM D. LEWIS; LEWIS & GANONG; RICHARD A. GANONG, INC.; NORMAN C. CROSS, JR.; KENT KLINEMAN,

Defendants,

and

CROSS AND COMPANY,

Defendant-Appellant.

No. 90-5045

IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA; and JOSEPH C. BENNETT, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.; MURRAY, PATTERSON & SHARPE, a partnership; DRYFOOS & COMPANY, a limited partnership; MCAFEE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF, a professional corporation; SIMPSON THACHER AND BARTLETT, a partnership; LEWIS & GANONG, a partnership; WILLIAM E. MURRAY; KENT KLINEMAN; WILLIAM BLUM; HARRY HELLER; RICHARD A.

GANONG; WILLIAM D. LEWIS; JOHN T. LENOIR; CARL E. CLAY; JACKSON M. BARTON; MARVIN R. BARNETT; FRANK E. SIMS; H.R. SMITH; DONALD C. LARRABEE; RICHARD A. GANONG, INC., a corporation,
Defendants,

and

KOTHE & EAGLETON, INC., a professional corporation,
Defendant-Appellant.

No. 90-5046

IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,
Defendants,

and

E.M. KUNKEL,
Defendant-Appellant.

No. 90-5047

RICHARD J. ANTON; MORRELL H. BLESH; ARTHUR M. BUECHE; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; JOSEPH H. GAUSS; MARGARET W. GILLESPIE; H.W. GOULDTHORPE; GEORGE L. HALLER; RALPH HART; CHARLES M. HEIDEN; DOROTHY C. HOLT; VICTOR HOLT, JR.; RICHARD M. HURST; P.J. JENSEN; ROBERT B. KEEGAN; MILTON F. KENT; MILLIE B. LASSING; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; FERDINAND F. MCALLISTER; FRANCIS K. MCCUNE; RUSSELL W. MCFALL; JOHN G. MARTIN; H.D. MEADER; BETTY JANE MILLS; DAVID K. MILLS; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; WILLIAM R. SMART; J. STANFORD SMITH; ROBERT P. STRUB; ESTATE OF VERA STRUB; VERNON UNDERWOOD; HOYT AMMIDON,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM D. LEWIS; RICHARD A. GANONG; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; LEWIS & GANONG, a partnership; ROBERT S. TRIPPET; THOMAS A. LANDRITH,

Defendants,

and

E.M. KUNKEL,

Defendant-Appellant.

No. 90-5048

MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1964 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; THOMAS A. LANDRITH, JR.; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership,

Defendants,

and

E.M. KUNKEL,

Defendant-Appellant.

No. 90-5049

A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. Burgess, Helen Burgess; DEWY I. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B.

COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARFF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR.; TED B. WESTFALL,

Plaintiffs-Appellees.

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM BLUM; THOMAS A. LANDRITH, JR.; MCAFEE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; NORMAN C. CROSS, JR.,

Defendants,

and

E.M. KUNKEL,

Defendant-Appellant.

No. 90-5051

MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; CHARLES M. HEIDEN; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; DOREEN B. HOYT; PETER J. JENSEN; MILTON F. KENT; MILLIE B. LASSING; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; THOMAS A. LANDRITH, JR.; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership,

Defendants.

and

E.M. KUNKEL,

Defendant-Appellant.

No. 90-5053

A.M. ANDERSON; RICHARD J. ANTON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, E.P. Bernuth, Sophie K. Bernuth, Joseph A. Buda, George

and Helen Burgess; DEWEY CALI; ROBERT B. COBURN; COBURN & LIBBY, INC.; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; MARGARET C. EVERETT; L.L. FERGUSON; ISADOR H. FINKELSTEIN; H.W. GOULDTHORPE; GEORGE L. HALLER; JACK HANSON; RALPH HART; F.H. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; HOWARD G. AND ELIZABETH C. KICHERER, JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; JOHN D. LOCKTON; D.W. AND D.B. LYNCH; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL MCFALL; JAMES F. MADDEN; ALBERT MANGANELLI; NICHOLAS MARCHESE; STANLEY A. MARKS; C.W. MOELLER; WILLIAM H. MORTENSEN; CARL AND PATRICIA OLSON; CARL PALERMO; FRANK PALERMO; ROY T. PARKER; HELEN M. REEDER; D.C. SCARFF; M.L. SCARFF; RICHARD SCOTT; LOUIS P. SINGER; WILLIAM R. SMART; J. STANFORD SMITH; G. CURTIS STEWART; PAUL TOWNSEND; VERNON UNDERWOOD; TED B. WESTFALL; J. HOWARD WOOD; SIDNEY WOOLWICH AND MURRAY ZIMMERMAN,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION, a Delaware corporation; ELMER M. KUNKEL; THOMAS A. LANDRITH; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership; NORMAN C. CROSS, JR.; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

No. 90-5055

A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. Burgess, Helen Burgsss; DEWY I. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B. COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARPF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR.; TED B. WESTFALL,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation;

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

No. 90-5056

A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. and Helen Burgess; DEWEY J. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B. COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN B. KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARFF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; E. STARR; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR.; TED B. WESTFALL,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION, a Delaware corporation; HARRY HELLER, SIMPSON THACHER AND BARTLETT, a partnership; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFEE, TAFT, MARK, BOND, RUCKS, AND

WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; NORMAN C. CROSS, JR.,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

No. 90-5057

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Marcella McHenry, Merl McHenry, Fred J. Borch, David Breslauer, Joseph A. Buda; DEWEY CALI; JAMES CLARK; MARY CLARK; WILLIAM H. COLQUHOUN; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; L.L. FERGUSON; JACK FINE; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; JAMES J. HAYES; EARL D. HILBURN; DOROTHY C. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; JOHN E. HUTCHINSON, III; HAROLD KAPLAN; W.S. JONES; HOWARD G. KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; D.W. LYNCH; D.B. LYNCH; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; ANTHONY MACAGNA; JAMES F. MADDEN; ALBERT MANGANELLI; NICOLAS A. MARCHESE; CHARLES J. MELOUN; C.W. MOELLER; CARL J. OLSON; PATRICIA OLSON;

THOMAS O. PAINE; CARL E. PALERMO; PRANK A. PALERMO; ROY T. PARKER, JR.; HOWARD RUBENSTEIN; D.D. SCARFF; M.L. SCARFF; C.S. SEMPLE; WILLIAM SMART; J. STANFORD SMITH; JANET G. STEWART; GERALD TOOMEY; OLIVER J. TROSTER; H.B. WALDRON, JR.; HUMBERTO ZAVALETA; MURRAY ZIMMERMAN,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION, a Delaware corporation; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM BLUM; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFFE, TAFT, MARK, BOND, RUCKS, AMD WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their succsssors and assigns; NORMAN C. CROSS, JR.; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

No. 90-5058

RICHARD J. ANTON; MORRELL H. BLESH; ARTHUR M. BUECHE; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; JOSEPH H. GAUSS; MARGARET W. GILLESPIE; H.W. GOULDTHORPE; GEORGE L. HALLER; RALPH HART; CHARLES M. HEIDEN; DOROTHY C. HOLT; VICTOR HOLT, JR.; RICHARD M. HURST; P.J. JENSEN; ROBERT B. KEEGAN; MILTON F. KENT; MILLIE B. LASSING; JOHN D. LOCKTON; D.W. LYNCH;

D.B. LYNCH; FERDINAND F. MCALLISTER; FRANCIS K. MCCUNE; RUSSELL W. MCFALL; JOHN G. MARTIN; H.D. MEADER; BETTY JANE MILLS; DAVID K. MILLS; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; WILLIAM R. SMART; J. STANFORD SMITH; ROBERT P. STRUB; ESTATE OF VERA STRUB; VERNON UNDERWOOD; HOYT AMMIDON,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPAMY; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION,
Defendants,

and

ROBERT S. TRIPPET,
Defendant-Appellant.

No. 90-5059

RICHARD J. ANTON; MORRELL H. BLESH; ARTHUR M. BUECHE; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; JOSEPH H. GAUSS; MARGARET W. GILLESPIE; H.W. GOULDTHORPE; GEORGE L. HALLER; RALPH HOLT; VICTOR HOLT, JR.; RICHARD M. HURST; P.J. JENSEN; ROBERT B. KEEGAN; MILTON F. KENT; MILLIE B. LASSING; JOHN D. LOCKTON; D.W. LYNCH; FERDINAND F. MCALLISTER; FRANCIS K. MCCUNE; RUSSELL W. MCFALL; JOHN G. MARTIN; H.D. MEADER; BETTY JANE MILLS; DAVID K. MILLS; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; WILLIAM R. SMART; J. STANFORD SMITH; ESTATE OF VERA STRUB; VERNON UNDERWOOD; HOYT AMMIDON,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM D. LEWIS; RICHARD A. GANONG; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; LEWIS & GANONG, a partnership; E.M. KUNKEL; THOMAS A. LANDRITH,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

No. 90-5062

MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

No. 90-5063

MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1964 PROGRAM OPERATING CORPORATION, a Delaware corporation; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AMD BARTLETT,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

No. 90-5064

IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

No. 90-5065

IVAN A. AMIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE

1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

No. 90-5066

IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LAMDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,

Defendants,

and

FRANK E. SIMS,
Defendant-Appellant.

No. 90-5067

IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,
Defendants,

and

FRANK E. SIMS,
Defendant-Appellant.

Appeals from the United States District Court For the Northern District of Oklahoma, D.C. Nos. 73-C-382, 74-C-180, 74-C-229, 74-C-230, 74-C-226, 74-C-224, 74-C-225, 74-C-229, 74-C-228, 74-C-230, 74-C-227, 74-C-225, 73-C-377, 73-C-381

Walter Steele, Denver, Colorado, and Thomas M. Affeldt, co-counsel, (C.B. Savage with him on the briefs) of Savage, O'Donnell, Scott, McNulty & Affeldt, Tulsa, Oklahoma, for Defendant-Appellant E.M. Kunkel.

B. Hayden Crawford (Kyle B. Haskins with him on the briefs) of Crawford, Crowe & Bainbridge, P.A., Tulsa, Oklahoma, for Defendants-Appellants Norman C. Cross, Jr.; Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr.; and Cross and Company.

Stan P. Doyle (James C. Thomas with him on the briefs) of Doyle & Harris, Tulsa, Oklahoma, for Appellant-Defendant Kothe & Eagleton, Inc., a professional corporation.

Peter Van N. Lockwood of Caplin & Drysdale, Chartered, Washington, D.C., (Elihu Inselbuch of Caplin & Drysdale, New York, New York; William A. Wineberg and Michael R. Simmonds of Broad, Schulz, Larson & Wineberg, San Francisco, California; and William H. Hinkle, Tulsa, Oklahoma, with him on the briefs) for Plaintiffs-Appellees.

Frank E. Sims, Pro Se Defendant-Appellant, Tulsa, Oklahoma, on the brief.

Robert S. Trippet, Pro Se Defendant-Appellant, Tulsa, Oklahoma, on the brief.

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

MOORE, Circuit Judge.

Despite the many issues raised in these consolidated appeals, a single question of law predominates our review. After study of the statutory scheme, the briefs, and record, we conclude the only question before us is whether this action was barred by the untimely filing of the original complaint under Section 13 of the Securities Act of 1933, as amended by the Securities Exchange Act of 1934, 15

U.S.C. § 77m. We hold that it was and, therefore, reverse the judgment and dismiss the complaint.

I. Background

In March 1973, Ivan A. Anixter, Blanche Dickenson, and Dolly Yoshida filed a lawsuit in the Northern District of California alleging Home-Stake Production Company and certain of its officers and directors conspired to violate the federal securities laws in their sale of interests in oil and gas production programs (the Anixter Action). After transfer of this and other individual suits to the Northern District of Oklahoma by the Judicial Panel on Multidistrict Litigation in 1974; amendments of the original complaint in 1974, 1979, and 1985; and the 1977 certification of nine separate classes to proceed with the case; a 1988 trial culminated in a jury verdict for all plaintiff classes and individually consolidated actions. Damages were awarded totalling approximately $130,000,000.

According to plaintiffs, liability was predicated on an elaborate and continuing scheme in which Home-Stake Production Company, an Oklahoma corporation engaged in the business of developing oil and gas properties, sold working interests in various program leaseholds, offering investors not only the promise of a return on the investment but also attractive tax benefits through individual deductions of intangible drilling costs (IDC). From 1964 until 1972, Home-Stake established subsidiary corporations, annual Program Operating Corporations (POC), representing separate production programs registered with the Securities and Exchange Commission (SEC) under 15 U.S.C. § 77a. Contrary to Home-Stake's representations, however, investments in one of these POCs were not directed at developing the particular oil property but instead were recirculated and recharacterized,[1] ultimately to be distributed to subsequent

[1] For example, plaintiffs set forth evidence that of the nearly $35,000,000 invested in the 1968 and 1969 POCs, only $500,000 could be attributed to development.

POC purchasers in the form of quarterly payments purported to represent income from oil production. In substance, plaintiffs claimed, these were classic Ponzi payments.

In response to wary or disgruntled investors who either threatened or filed action, Home-Stake would repurchase investments or settle investor suits.[2] At various times, the IRS audited individual investor's tax returns, questioning the IDC deductions, and summoned Home-Stake representatives to answer questions about accounting methods, record-keeping, and production activities, Finally, in late 1970, the SEC initiated an investigation of Home-Stake.

On February 10, 1971, the SEC filed a complaint in the United States District Court for the District of Columbia (Exh. RD 657), alleging the Home-Stake 1970 POC, Home-Stake Production Company, and certain Home-Stake officers and directors, Robert S. Trippet, E.M. Kunkel, Thomas Landrith, J.D. Metcalfe, H.B. Gutelius, and H.L. Fitzgerald,[3] failed to meet the information requirements of Section 10 of the Securities Act of 1933 (the 1933 Act); overestimated oil reserves and income in the nine oil recovery projects represented to be selected for the 1970 POC; disseminated information in the 1970 registration filed with the SEC which conflicted with program information in un-

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[2] In 1968, for example, an action was filed in the Northern District of Oklahoma alleging violations of the securities laws under Sections 10(b) and 17(a) as well as common law fraud and other claims. The case was certified as a class action, *George H. McFadden & Bro., Inc. v. Home-Stake Prod. Co.*, 295 F. Supp. 590 (N.D. Okla. 1968). However, the class representative subsequently accepted the settlement offered by Home-Stake and withdrew the motion for class certification. The district court dismissed the action with prejudice.

[3] Each of these defendants was again named in the 1973 Anixter Action, which also added the 1965 and 1971 POCs and Norman C. Cross, Jr.

registered Black Books;[4] filed a post-effective amendment with the SEC distributed to all POC participants containing representations with which it could not comply;[5] and oversold the 1970 POC, investing a substantial part of the $22,000,000 received in short-term notes. The SEC alleged these activities were in violation of Sections 5(a), 5(b), and 17(a) of the 1933 Act and Section 10(b) of the 1934 Securities Exchange Act (the 1934 Act), and Rule 10b-5, 17 C.F.R. § 240.10b-5. The SEC requested the named defendants cease engaging in these activities and offer rescission to public investors who had purchased the 1970 POC. Subsequently, on February 16, 1971, *The Wall Street Journal* published an article about the SEC investigation and allegations.

On April 23, 1971, upon defendants' consent, the district court entered a final judgment permanently enjoining defendants from engaging in the activities specified in the complaint and ordering defendants to make an offer to all 1970 POC participants to return the purchase price plus a pro-rata share of all income earned on the subscription from the date of purchase payment to the date of repayment. (Exh. RD 659). To effect this remedy, the court designated the First National Bank and Trust Company of Tulsa, Oklahoma, trustee of the rescission fund. On April 30, 1971, the trustee mailed each participant in the 1970 POC a copy of the final judgment and a Rescission Offer Prospectus.

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[4] The SEC's discovery of these Black Books or Program Books was one red flag which triggered the 1970 SEC investigation. The Black Books were not registered with the SEC but were mailed to all POC participants. Program Books contained descriptions of specific oil recovery programs, estimates of projected returns, projected program budgets, etc.

[5] For example, the 1970 POC involved the development of certain Venezuelan oil reserves, a highly risky venture given Venezuela's threat to nationalize the industry. Home-Stake represented that it would indemnify 1970 POC purchasers in the event of expropriation.

(Exh. RD 410). Of the more than 900 investors in the 1970 POC, 279 elected rescission.

According to plaintiffs' theory, the SEC investigation and suit never exposed the root of Home-Stake's fraudulent operation. They claimed further the resulting settlement and Rescission Offer not only incorporated the continuing fraud but also clothed subsequent activities in the mantle of legitimacy. Home-Stake organized and sold a 1971 and 1972 POC. In 1973, the IRS and SEC again undertook investigations of Home-Stake. Inevitably, Home-Stake's money ran out, its scheme collapsed, and on September 20, 1973, Home-Stake filed a petition for reorganization under Chapter X of the Bankruptcy Act of 1938. *The Wall Street Journal* reported the event on September 20, 1973.

II. Prior Proceedings

In 1975, after the first amended complaint was filed (Anixter I),[6] the United States District Court for the Northern District of Oklahoma[7] first addressed the statute of limitations issue raised in various defendants' motions to dismiss. *In re Home-Stake Prod. Co. Sec. Litig.*, 76 F.R.D. 337 (N.D. Okla. 1975). In that order, the court held the one-year/three-year limitations periods in Section 13 of the 1933 Act, 15 U.S.C. § 77m, "should be tolled in the interests of substantial justice by reason of the extraordinary

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[6] Plaintiffs amended the Anixter Action on May 24, 1974, and designated this first amended complaint as Anixter I. Anixter I added plaintiff classes for the 1964 and 1972 POCs and certain defendants. Defendants, Kothe & Eagleton, Inc., a Tulsa law firm (K & E), and Norman C. Cross, a Tulsa accountant, doing business as Cross & Co., were also named in Anixter I.

[7] Judge George H. Boldt, Senior United States Judge for the District of Washington, presided by designation over the early stages of the action. Later, Judge H. Dale Cook of the Northern District of Oklahoma was assigned the case, followed by Judge Manuel Real of the Northern District of California, who sat by designation and handled most of the pretrial matters. Judge Real tried the case.

facts and circumstances alleged by plaintiffs." *Id.* at 344. To reach this conclusion, the court cited the unusual circumstance of the duration of the fraudulent scheme spanning a ten-year period, exacerbated by Home-Stake's additional fraud on the courts [8] and the SEC.[9] Surely, the court reasoned, these facts mandated applying the equitable principle of tolling to the statute of limitations to prevent defendants from further benefiting from their successful fraudulent concealment and victimizing the investors, the courts, and the SEC. To support this analysis, the court relied on the discovery rule in the doctrine of fraudulent concealment as enunciated in *Bailey v. Glover*, 88 U.S. 342 (1874), and *Holmberg v. Armbrecht*, 327 U.S. 392 (1946).[10] *Holmberg*'s pronouncement that "[t]his equitable doctrine is read into every federal statute of limitation," 327 U.S. at 397, was reinforced, the district court noted, by subsequent authority establishing that even when Congress announces a limitations period, the federal courts are not powerless "to hold that the statute of limitations is tolled under cer-

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[8] The court cited Home-Stake's settling the 1968 *George H. McFadden* class action as an example of fraud on the court.

[9] The court observed that Home-Stake "conceded technical violations of the securities laws, but failed to disclose that little or no oil from its prior programs had been produced, that its 1965 through 1969 programs had been oversold, or that the assets of its financial statement were nonexistent and that Home-Stake was insolvent." 76 F.R.D. at 342.

[10] In *Holmberg*, the Court refused to apply the state statute of limitations to an action to enforce a federally created equitable right, reminding:

> And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

327 U.S. at 397 (quoting *Bailey v. Glover*, 88 U.S. 342, 348 (1874)).

tain circumstances not inconsistent with the legislative purpose," quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974); *see also Exploration Co. v. United States*, 247 U.S. 435 (1918). Read in this light, Section 13 did not disclose a congressional intent to ignore equitable principles, the district court surmised. Indeed, it observed, "[t]his Court is cognizant that no legislative history is available to indicate whether Congress intended Section 13 to be an absolute bar to actions under Sections 11 and 12(2) when a defendant has fraudulently concealed his scheme for more than three years." *In re Home-Stake*, 76 F.R.D. at 344.[11] The district court concluded neither the one-year nor three-year limitations barred the action.[12]

Moreover, the district court held the later amendment adding certain defendants in Anixter I was proper because

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[11] While acknowledging neither *Bailey*, 88 U.S. at 342, nor *Holmberg* involved Section 13, the district court believed the wording of the limitations at issue in these cases was "equally as absolute." 76 F.R.D. at 344. In *Holmberg*, because there was no federal statute of limitations governing claims under the Federal Farm Loan Act, the question was whether to read the equitable doctrine into the borrowed state statute of limitations. The *Holmberg* court, however, stated, "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive. *The rub comes when Congress is silent.*" 327 U.S. at 395 (emphasis added). The statute of limitations in *Bailey*, 88 U.S. at 342, was contained in the Bankrupt Act of 1867:

> [B]ut no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person *claiming* an adverse interest, touching the property or rights of property aforesaid, in any court whatsoever, unless the same shall be brought *within two years from the time of the cause of action accrued for or against such assignee.*

(quoted by the Court in *Bailey*, 88 U.S. at 344). The Court stated that concealed fraud is an exception on purely equitable principles, "provided suit is brought within proper time after the discovery of the fraud." *Id.* at 348.

[12] At that stage of the pretrial proceedings, the district court appeared reluctant to dismiss the case given plaintiffs' factual allegations.

it related back to the timely filing of the Anixter Action under Fed. R. Civ. P. 15(c). Finding defendants added in May 1974 were given fair notice of the action and would not be prejudiced by their late entry, the district court concluded that a liberal application of Rule 15(c) permitted amending the pleadings where the new claims and defendants were "related to the alleged ongoing scheme to defraud Home-Stake investors." *Id.* at 346.

Thus preserved for a trial which was not to begin for another thirteen years, the question of the statute of limitations was conjoined with that of liability in a bifurcated proceeding.[13] The jury returned interrogatories on the questions of equitable tolling and equitable estoppel.[14] In a subsequent order, the district court held, as a matter of law, that plaintiffs did not discover nor should have discovered by the exercise of reasonable diligence the violations until September 1973, presumably when Home-Stake filed for bankruptcy reorganization, and thus were not time-barred under Section 13 "because of defendants' fraudulent concealment of plaintiffs' causes of action and the doctrine of equitable tolling." (Order, Oct. 17, 1988, Tab 2597). Alternatively, the court held defendants equitably estopped from raising the defense of the statute of limitations based on the jury's findings that defendants "intentionally thwarted

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[13] In its pretrial order of January 28, 1987, [sic] the district court rescinded its prior bifurcation order and ruled that the question of the statute of limitations would not be tried separately.

[14] The interrogatories on equitable estoppel asked the jury to decide whether plaintiffs had proved by a preponderance of evidence that a particular class representative, individually and as a representative of the class, "did not discover nor should have discovered by the exercise of reasonable diligence" that by September 1973, the defendant violated, for example, Rule 10b-5. Alternative dates were also listed. The special interrogatories on equitable estoppel asked the jury whether each defendant "intended to and did thwart and defeat" the federal courts, the IRS, and SEC in their respective judicial and administrative purposes.

and defeated the federal courts, the SEC, and the IRS in their efforts to administer and enforce the laws of the United States. . . ." *Id.* The district court later denied defendants' motion for an interlocutory appeal on the issue of the statute of limitations. (Order, Nov. 16, 1988, Tab 1609).

In this appeal, joint defendants, Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr.; Cross and Company; Kothe & Eagleton, Inc.; and E.M. Kunkel; and individual defendants, Robert S. Trippet, pro se, formerly chief executive officer of Home-Stake; and Frank Sims, pro se, formerly Home-Stake vice-president, challenge these orders. Although numerous issues are raised, the application of the statute of limitations is dispositive.

III. Section 13

Time and zealous lawyering have unnecessarily obfuscated the limitations issue before us, blending distinct and discrete doctrines into a fungibility that creates an exception to Section 13 that virtually swallows the rule.[15] It is time to set the matter straight and attempt to restore this case to its proper place in securities jurisprudence. Our task

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[15] We note parenthetically that *In re Home-Stake* is recognized in the treatises as the "sole exception" to the three-year absolute bar under Section 13. 3A H. Bloomenthal, *Securities and Federal Corporate Law* § 8.31[3][m], at 8-156.62 (1991) (hereinafter Bloomenthal); *see also* 1 T. Hazen, *The Law of Securities Regulation* § 7.5.4, at 341 (2d ed. 1990) (hereinafter Hazen); 5 A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud* § 11.9(200), at 11:204 (1990) (hereinafter Bromberg). Similar distinctions appear in case law. *Home-Stake*'s application of equitable tolling has been distinguished on the ground that the fraud was singularly pervasive and long-standing. *Gale v. Great Southwestern Exploration*, 599 F. Supp. 55, 57 (N.D. Okla. 1984). Alternatively, *Home-Stake* is cited for its application of equitable estoppel to Section 13. For example, *Zola v. Gordon*, 685 F. Supp. 354, 361 (S.D.N.Y. 1988), concluded that since equitable tolling could not overcome the three-year absolute bar, the case must stand for the proposition that equitable estoppel could trump Section 13.

has been simplified and the result bolstered by the Supreme Court's recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ S. Ct. ___ , (1991) WL 105240, June 20, 1991) (hereinafter *Lampf, Pleva*).

We, then, begin at the beginning [16] with the language of Section 13, 15 U.S.C. § 77m, the statute of limitations for express causes of action under Sections 11, 12:

> No action shall be maintained to enforce any liability created under section 11 or 12(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or 12(1) of this title more than three years after the security was bona fide offered to the public, or under section 12 [sic] of this title more than three years after the sale.

Section 13 sets forth a statute of limitations framed by a statute of repose.[17] Under this provision, plaintiffs have one year from the date of discovery of a violation to file an action. Defendants who may be liable for such a violation, however, are safe from any liability arising from the violation if the action is not brought within three years of the violation itself. Three undisputed principles exist within

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[16] "Begin at the beginning," the King said, very gravely, "and go on till you come to the end: then stop." Lewis Carroll, *Alice's Adventures in Wonderland*.

[17] At the outset, we acknowledge the considerable discussions in the case law and commentary on Section 13 as a statute of limitations, a statute of repose, or a combination of the two. *E.g.*, 1 T. Hazen, § 7.5.4, at 335. Although the two concepts differ, the terminology has become interchangeable.

the statute. First, Section 13 is clear on its face: discovery starts the one-year limitation running. Second, the phrasing of the discovery rule incorporates the doctrine of fraudulent concealment, pegging accrual of the cause of action for a concealed fraud to the date "after such discovery should have been made by the exercise of reasonable diligence." [18] Third, while the Section 13 discovery rule incorporates the doctrine of fraudulent concealment, the one-year-after-discovery provision will be extended "in no event . . . more than three years after the security was bona fide offered to the public, or . . . after the sale." 15 U.S.C. § 77m.

The one-year/three-year provisions are not disjunctive. If a putative plaintiff knows or comes to know of the existence of an actionable violation, this person must file suit within one year of the day of discovery. If a putative plaintiff *should* have discovered the cause of action, suit must be filed within one year of the day the discovery should have been made. If discovery does not occur or should not have occurred within three years of the date a "security was bona fide offered to the public," the cause of action lapses and cannot be enforced for any reason. To comply with Section 13, the plaintiff must "plead and prove facts showing that his claim was timely with respect to both the one year and three year limitations periods." J. Hicks, *Civil Liabilities: Enforcement & Litigation Under the 1933 Act* § 6.10[1], at 6-274 (1989).

What is critical to understanding Section 13 as a statute of repose, particularly in light of this case, is the recognition that, as such, not only is the remedy barred, but, also, the liability itself is extinguished. "Section 13 is substantive, rather than procedural; it establishe[s] an essential ingre-

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[18] In *Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978), the court observed, "The doctrine of fraudulent concealment is the common law counterpart of the 'discovery' standard prescribed by § 13 to limit actions brought under § 12(2) of the 1933 Act. Thus, the running of both statutes of limitations is triggered by identical considerations."

dient to a private cause of action." *Id.* Thus, an untimely complaint must be dismissed as a matter of law.

Although this reading is clear from the language of Section 13, the legislative history reinforces the "conclusion that the three-year period is an outside absolute period." 3A H. Bloomenthal, *Securities and Federal Corporate Law* § 8.31[3][m], at 8-156.61 (1991) (hereinafter Bloomenthal).[19] The Congressional Record memorializes the Senate debate focusing on whether to include one or two limitations periods and the lengths of those periods. *See* 1 *Federal Securities Laws—Legislative History 1933-1982* (1983) prepared by the Securities Law Committee of the Federal Bar Association.[20] What concerned Senator Norris about the two limitations periods was their delaying effect on settling cases which otherwise would have to be filed immediately upon discovery of the fraud. Senator Byrne, however, who argued for the two limits with an absolute outer bar, noted that since Section 12 litigation might involve corporate directors, "it would deter men from serving on boards of directors, because the man might die and his estate would be liable possibly 8 years after his death to a suit brought by an individual." *Id.* at 1010. The record of the debate establishes an awareness of the difference between easily discovering a fraud and the more difficult problem when the fraud has been concealed. However, there was no disagreement over the need for an absolute bar. As Senator Barkley stated, "As I said, I am not concerned with whether the limit is fixed at 1 year or 2 years after the discovery, but I think there ought to be a limitation after the discovery has been made with the limit of 5 years." *Id.* at 1011. Senator Bark-

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[19] Albeit resort to legislative history is unnecessary when the statute is clear on its face, *United States v. Oregon*, 366 U.S. 643, 648 (1961), it is particularly helpful here to understand the import of the language at issue.

[20] Contrary to the district court's surmise, the legislative history is remarkably complete and helpful.

ley also observed, "I think we have to consider this proposed statute of limitations in a little different light from that in which we consider ordinary statutes of limitations." *Id.* The 1933 Act included the one-year/five-year scheme, which was amended in 1934, shortening the five-year outer limit to three years.

Of this debate, Judge Easterbrook remarked, "The legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute." *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987). Indeed, in quoting portions of this debate, the Second Circuit opined, it even "strongly suggests that Congress, if it had provided an express right of action under §§ 10(b) and 14, would have adopted a one-year/three-year period." *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 363 (2d Cir. 1990).[21]

Thus, under Section 13, if a plaintiff has notice of a violation, the one-year limitation is triggered. If plaintiff has no notice, Section 13 functions as a statute of repose, and the violation is actionable only within the three years subsequent to the date of offering. Consequently, no concept of equitable tolling can have validity beyond the three-year period of repose because Congress did not allow for breaching the Chinese Wall it intentionally created. Only this construct "is consonant with the legislative scheme." *American Pipe & Constr. Co.*, 414 U.S. 538, at 558. As the court noted in *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1395 (7th Cir. 1990):

> Courts say that equitable tolling does not apply under § 13, but this is not strictly accurate. It is better to

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[21] In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ S. Ct. ___ (1991 WL 105240, June 20, 1991), the Court noted this observation with approval.

> say that equitable tolling and related doctrines do not extend the period of limitations by more than the two-year grace period § 13 allows. Congress did not obliterate these valuable doctrines so much as it set bounds on the length of delay.[22]

While equitable tolling focuses on when the statute of limitations begins to run, "[e]quitable estoppel acknowledges that the statute has run, but is invoked to estop the defendant from asserting that defense because a defendant's actions lulled a plaintiff into forbearing bringing suit within the period of limitations." 3A Bloomenthal, § 8.31[3][o], at 8-156.68. We have noted "[e]quitable estoppel arises where the parties recognize the basis for suit, but the wrongdoer prevails upon the other to forgo enforcing his right until the statutory time has lapsed." *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n.7 (10th Cir. 1980).[23] Indeed, the congressional debate addressed the problem of parties' attempting to settle or negotiate a claimed violation in the face of the unfairness of the running of the limitations period. Emphatically, Congress opted for the absolute bar.

While there may be circumscribed settings in which the doctrine of equitable estoppel might apply[24] to claims gov-

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[22] In its recent ruling under Section 10(b), the Court has bolstered this conclusion. "Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." *Lampf, Pleva*, ___ S. Ct. ___ (1991 WL 105240).

[23] In this same footnote, the *Aldrich* court agreed with the Seventh Circuit in *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978), which had stated, "equitable estoppel may prevent reliance on a statute of limitations which nevertheless cannot be tolled by other equitable principles." *Aldrich*, in dicta, however, only left "open the possibility of equitable estoppel" but stated that under the limitations provision of the Interstate Land Sales Full Disclosure Act (ILSFDA), equitable tolling could not extend suit past the three-year bar. *Aldrich v. McCulloch Properties*, 627 F.2d 1036, 1043 n.7 (10th Cir.1980).

[24] *Katz v. Amos Treat & Co.*, 411 F.2d 1046 (2d Cir. 1969), is such a case. In another, *Bomba*, 579 F.2d at 1067, a case under the ILSFDA,

erned by Section 13,[25] we believe the more accurate analysis excludes the application of this doctrine when the consequence operates to trump a clear outer limit intended by Congress. "Unless the 'in no event more than three' language cuts off claims of tolling and estoppel at three years, however, it serves no purpose at all -- what other function could be served by such language in a statute that starts the time on discovery?" *Short v. Belleville Shoe*, 908 F.2d at 1391.[26] We therefore conclude that the doctrine of equitable estoppel is not available to avoid the statute of repose established by Section 13.[27]

Indeed, except for *Home-Stake*,[28] there is virtual uniformity in holding the three-year limit as an absolute bar to

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which contains a similarly worded statute of limitations, defendant promised to refund plaintiffs' purchase money for two lots on which defendant had failed to produce the proper reports. Although he offered rescission, defendant never fulfilled his promise to pay until after the statute of limitations had run. Under *Bomba*, "absent some affirmative indication that Congress expressly intended to exclude the application of equitable estoppel," *id.* at 1070, the federal doctrine may be read into every federal cause of action. *See Cange v. Stotler and Co.*, 826 F.2d 581 (7th Cir. 1987) (equitable estoppel applies to actions under Commodity Exchange Act).

[25] In his treatise, Bloomenthal attempts to delineate conduct other than that involved in the underlying claim as the distinguishing factor. 3A Bloomenthal, § 8.31[3][o], at 8-156.68. Nevertheless, given the bright line Congress set down, we believe the more consistent approach must reject infiltrating these equitable doctrines into Section 13. There is simply no other way to read Section 13 and preserve its meaning.

[26] In dicta, the Seventh Circuit left open the question whether equitable estoppel could postpone the running of the one-year period after discovery but was emphatic about the consequence of the three-year outer limit.

[27] Although *Lampf, Pleva* did not address this issue, its holding the doctrine of equitable tolling inapplicable to the one-year/three-year limitary structure would necessarily foreclose application of equitable estoppel as well.

[28] Plaintiffs also rely on *Katz v. Amos Treat & Co.*, 411 F.2d at 1046, which is typically cited for its atypical reading of § 13. In that case,

suit. *See, e.g., Short v. Belleville Shoe*, 908 F.2d at 1393; *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir. 1982); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. Unit B Dec. 1981), *cert. denied*, 458 U.S. 1106 (1982).[29] This harmony effectuates the remedial scheme created to enforce the rights given by the 1933 Act.

In the Anixter Action, plaintiffs alleged they did not discover defendants' fraud until March 1973. Nevertheless, without notice, plaintiffs had only three years from the date plaintiffs purchased their POCs in which to file suit. Thus, we conclude as a matter of law, plaintiff class representatives for the 1964, 1965, 1966, 1967, 1968 and 1969 POCs, William Dennler, John D. Lockton, Ted Westfall, William Mortenson, William D. Robertson, and Thomas Thorner, respectively, were barred from suit by the three-year statute of repose.[30] Neither equitable tolling nor equitable estoppel can salvage their claims.

The more difficult issue remains, however, whether suit was timely filed by the 1970, 1971, and 1972 class repre-

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which is typically cited for its atypical reading of § 13. In that case, plaintiff purchased unregistered securities in 1960 upon the assurance the securities would soon be registered. Although plaintiff did not file the action under § 12(1) until 1962, the court did not foreclose suit on the ground that defendant's continued assurances that the securities would be registered abated the notice date.

[29] During oral argument, counsel for plaintiffs stated he was unaware of any case characterizing Section 13 as a statute of repose, making it "self-operative" to extinguish liability. "I am not aware of any such case that holds that, and I don't see any policy reason why this court should do it, I don't see why this court should reach out and try and make Section 13 such a draconian provision." Transcript of Oral Argument, at p.64.

[30] Although we shall discuss the statute of limitations for their claims under Rule 10b-5, these plaintiffs failed to timely preserve that action as well. In this group, we also include the individual actions appended to the nine class actions when all of these suits were consolidated. *See* Pretrial Order, Jan. 29, 1988, Tab PTO, pp. 7-12.

sentatives, William Grohne, Beatrice Warren,[31] and Joseph C. Bennett. That question can only be answered by determining when plaintiffs knew or should have known with the exercise of diligence that fraud was afoot.

In the original complaint[32] plaintiffs alleged fraudulent concealment:

> Plaintiffs had no knowledge of the alleged combination and conspiracy or any facts which might have led to the discovery thereof until March of 1973, at which time plaintiffs were informed that the Internal Revenue Service had determined that Home-Stake Production Company had not expended funds received by it for the purpose of conducting intangible drilling, but had converted these funds to its own uses. Plaintiffs could not have uncovered the combination and conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful acts had been fraudulently concealed by defendants through its resort to secrecy to avoid detection, by its repeated statements that substantial oil production was being achieved for each of the programs and the payments which the participants received with respect to their program investments which purported to be income from the production of oil.

This allegation was revised in successive amended complaints and later subtitled, Equitable Tolling:

> By reason of the extraordinary nature of the facts alleged above . . . and in order to fully effectuate the purposes of the Securities Acts the statute of limitations applicable to the causes of actions brought herein

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[31] The original representative for the 1971 POC, Beverly Warren, died, and his widow became the class representative.

[32] Although the original complaint was not included in the record, the court, on its own motion, requested supplementing the record.

should be tolled at least until September 20, 1973 based upon established principles of equity.

Our analysis has been complicated by the paucity of specific evidence provided in the record to delineate when specific claims arose.[33] Nevertheless, because the district court applied both equitable doctrines to these claims as well, we are constrained to presume the court found the statute of limitations had run. However, while this observation may explain the preservation of the 1964 through 1969 suits when they were clearly barred, it remains insufficient to understand why the 1970, 1971, and 1972 suits survived the statutory discovery rule but now must fail.

Notice is the key to our analysis, and merely "inquiry notice" will do. *DeBruyne v. Equitable Life Assur. Soc. of the United States*, 920 F.2d 457, 466 (7th Cir. 1990). The discovery period, "one year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence," does not "commence only when a plaintiff has full knowledge of the existence of a claim. On the contrary, the one-year limitations period begins to run even when a plaintiff is placed on 'inquiry notice' of possible misrepresentations." *Id.* at 466 (citations omitted). The Seventh Circuit has characterized those facts triggering inquiry notice as "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved in the sale." *Cook v. Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978).

Kennedy v. Josephthal & Co., 814 F.2d 798 (1st Cir. 1987), is instructive. In that case, plaintiffs purchased shares of a limited partnership involved in the mining and sale of coal. The Offering Memorandum indicated not only the high

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[33] For example, we find no cancelled checks or other documentation to establish when each class representative actually purchased an interest.

degree of risk but also, given all the risks and contingencies, the partnership "would, in all likelihood, utterly fail as a viable coal mining operation." *Id.* at 801. In the face of these written representations, plaintiffs claimed to rely on the oral statements of defendant's representative limning a more positive, profitable, and safe venture. Recognizing plaintiffs may have had mixed motives in their purchase, including that of a tax shelter which "[is] sometimes more useful to investors than another real investment," *id.* at 801-02, the court nevertheless exacted an objective standard of reasonable diligence. In response to plaintiffs' claim they could not have discovered the fraud earlier because of defendants' continuing fraudulent misrepresentations and omissions, the court instructed, "Appellants need not, however, have fully discovered the nature and extent of the fraud before they were on notice that something may have been amiss. Inquiry notice is triggered by evidence of the possibility of fraud, not full exposition of the scam itself." *Id.* at 802.[34] *See also State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981).

Thus, Section 13 holds plaintiffs to a stringent standard of proof.[35] *Toombs v. Leone*, 777 F.2d 465, 468 (9th Cir. 1985). Against this standard, plaintiffs, who had purchased securities from 1970 through 1972, averred they were placed on notice in March 1973 when the IRS represented it would disallow their IDC deductions upon its discovery that Home-Stake had not expended funds on drilling wells. To accept

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[34] The court found appellants were on inquiry notice at the time they examined the Offering Memorandum and compared it to their broker's conflicting statements. Having purchased their securities in December 1979, appellants thus had to sue by December 1980. Their 1981 suit was untimely.

[35] In his treatise, Bromberg states, "By charging plaintiff with constructive knowledge, § 13 is stricter than his basic cause of action under either §§ 11 or 12(2), which charges him only with actual knowledge." 4 Bromberg, § 8.4(318), at 204.16.

this event to constitute plaintiffs' inquiry notice, we would have to ignore the fact that the SEC filed a complaint in February 1971 alleging violations of the registration and antifraud provisions of the securities laws, after which each plaintiff received notice of the court order and rescission remedy.[36] Surely, the order, the Rescission Offer, and *The Wall Street Journal* article of February 11, 1971, represent "great glowering clouds," *Kennedy v. Josephthal*, 814 F.2d at 802, sufficient to put plaintiffs on notice that something was amiss. *See also Bush v. Rewald*, 619 F. Supp. 585, 602 (D. Haw. 1985).

The Rescission Offer told recipients to "rely *solely* on the information contained in this prospectus." (Exh. RD 410) (emphasis added). All other information was to be "disregarded entirely." The document stated:

> BY THIS PROSPECTUS HOME-STAKE 1970 PROGRAM OPERATING CORPORATION ("OPERATOR") HEREBY OFFERS TO RESCIND ALL PAYMENTS MADE BY PARTICIPANTS ON UNITS OF PARTICIPATION ("UNITS") IN ACCORDANCE WITH THE CONSENT DECREE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA MORE FULLY DESCRIBED UNDER THE HEADING "RESCISSION OFFER" HEREIN. UNDER THE TERMS OF THE OFFER, PARTICIPANTS MAY ELECT TO RECEIVE THE RETURN OF THEIR PAYMENTS MADE IN 1970 AGGREGATING $23,080,000 FOR SUBSCRIBED UNITS PLUS INTEREST, AS MORE FULLY DESCRIBED UNDER THE HEADING "RESCISSION OFFER" HEREIN.

Investors were offered the return of their investment plus interest. In contrast to all of these written materials, R.S.

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[36] Purchasers of the 1971 POC had notice of the Rescission Offer in the 1971 Prospectus. We recognize William Bennett, the 1972 class representative, did not receive that specific notice. However, the record reflects he read the 1972 Prospectus which contained information about the 1971 SEC action and settlement, and made inquiry.

Trippet, Home-Stake's CEO, wrote his own memos trivializing the investigation and suit and castigating the SEC.[37] Against these representations, individual investors made their own decisions based as much on tax considerations as investment concerns.

For example, William Grohne, the 1970 class representative, acknowledged he received the Rescission Offer and considered it. He decided not to rescind because it would have cost him $2,000 in additional taxes. (R. XV, 1809). Although he was concerned that programs were going forward without seeing his quarterly payments reflect increases from the larger oil production, he did not act.

Beverly Warren, a retired business executive who represented the 1971 class,[38] stated he scanned the Rescission Prospectus and thought it looked only "a little more severe" than a normal risk prospectus. (R. XVI, 1919). Acknowledging the high degree of risk involved in these ventures, he stated his decision to purchase a POC was based on both the investment and tax advantages, although without

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[37] One Trippet memorandum referred to the government's tyranny in investigating and muzzling Home-Stake. The "Tale of Two Cities," Washington, D.C., and Tulsa, Oklahoma, Trippet wrote, continued to reveal "the tyranny of the state over the individual." (Exh. DX 169). In another letter to Thomas Thorner, the 1969 class representative, Trippet explained that the word "fraud" was used to produce an "emotional semantic reaction to its own advantage to evoke Pavlovian responses in the readers and listeners when it uses the same word." (Exh. DX 167). Trippet, characterizing the alleged violations as technical, categorically denied them "except for a couple of the parking ticket variety," and called the SEC's oil reserve estimates misleading, made by SEC "testifying engineers" who are "poor-as-church-mice punks making about $18,000 per year and lucky to be doing that, because they can't make anyone's team." (Exh. DX 167).

[38] As noted earlier, at the time of trial, Mr. Warren was deceased. His deposition was read into the record. Mr. Warren had purchased units in the 1964, 1965, 1966, 1967 and 1968 POCs, three units in the 1969 POC, two units in the 1970 POC, three units in 1971, and three units in 1972.

the tax incentives, he would not have invested. (R. XVI, 1936).

Finally, Joseph Bennett, the 1972 class representative, with undergraduate and graduate degrees in mineral engineering and mineral economics, first learned of the Home-Stake program in October 1972 while exploring investments which would have the additional feature of deductibility to offset a 1972 stock bonus he had received. Asked on direct examination if he had read the information in the 1972 Prospectus about the 1971 legal proceedings, Mr. Bennett responded he considered it a hurdle to overcome before committing to the investment. After speaking to his broker, he concluded Home-Stake had gotten its wrist slapped for aggressive overselling of the 1970 POC but was convinced the SEC was satisfied. (R. XV, 1755). Like other Home-Stake investors, Mr. Bennett's income was substantial. At his 60-65% tax bracket, a $20,000 investment would, he said, provide $13,000 in tax savings although he understood the oil and gas business involved a high degree of risk.

Attempting to place this individual testimony on the larger stage of the ongoing plot, plaintiffs postulate the underlying Ponzi scheme was concealed by more intricate machinations to deceive the SEC and the United States District Court for the District of Columbia. When an investor, in fact, became suspicious, plaintiffs urge, Home-Stake bought him out or permitted him to roll the investment over into another POC.[39] Discovery was impossible until the entire scheme collapsed, they argued.

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[39] Although plaintiffs insist the evidence of settling claims was integral to the continuing scheme to defraud, we think it cuts both ways. Alternatively, this evidence could show Home-Stake simply wanted to satisfy its investors. Once recompensed, what interest did the investor have in sleuthing the scam? Moreover, the investor received generally what he would have from filing suit, recovery of the consideration paid plus interest. The only flaw in this approach was that the money ran out. In neither case, however, does equitable estoppel translate this conduct into a fraud on the court. If an investor chooses to settle his case, that choice, without more, is not fraudulent.

According to plaintiffs' theory, when defendants' fraud was passive, that is in the manipulation of the Ponzi scheme itself, equitable tolling suspended the statute of limitations until Home-Stake collapsed. Alternatively, plaintiffs asserted, and the court apparently embraced, the theory that the doctrine of equitable estoppel redressed defendants' active fraud in deceiving the SEC, IRS, and courts.[40] Fueling application of either doctrine, they insist, is the uniqueness of the facts of this case, a debacle that Section 13 could not have contemplated.

However, the uniqueness of Home-Stake's fraud does not mandate a different application of Section 13 when plaintiffs seek express securities remedies. At the very core of fraud is an act of concealment. Were we to follow plaintiffs' argument to its logical conclusion, there would be no statute of limitations in a fraud action because of the perpetrator's essential need to escape detection. That is why Congress enacted a statute of repose. Moreover, carving out a special exception to Section 13 for a "secondary act" of fraud or "active concealment" would eliminate the one-year statute of limitations and entirely nullify the effect of the statute of repose.

Instead, Section 13 exacts more of the prudent investor. "After the plaintiff has notice, there is a strong federal interest in requiring him to file suit quickly." *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 463 (3d Cir. 1979) (Seitz, C.J., dissenting), quoted in *In re Data Access Systems Sec. Litig.*, 843 F.2d 1537, 1546 (3d Cir.), *cert. denied, sub nom. Vitiello v. I. Kahlowski & Co.*, 488 U.S. 849 (1988).

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[40] Plaintiffs continually refer to defendants' fraud on the "courts" without specifying the act of fraud on the particular court. Moreover, their use of the terminology "fraud on the court" is quite generic, encompassing actions between parties unrelated to a court proceeding. However, "[f]raud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985).

The SEC provided notice to Home-Stake investors that certain violations of the securities laws were alleged, and based on those violations, Home-Stake agreed to rescind the 1970 POC. In the face of that information, individual investors, as already noted, made their own calculations, perhaps based on the Rescission Prospectus or R.S. Trippet's assurances. However, Section 13 does not contemplate weighing individual investment concerns and tax considerations. "Prudent investors almost always can sniff out fraud (or enough smoke to justify litigation) within three years. Section 13 cuts off only the claims of the most trusting or somnolent—or the most wily, those who wanted to wait as long as possible." *Short v. Belleville Shoe*, 908 F.2d at 1392.

The claims of class representatives William Grohne, 1970 POC, and Beverly Warren, 1971 POC, were included in the March 1973 complaint. Although each knew about the 1971 SEC investigation and settlement, both chose neither to investigate further nor to rescind based on personal investment decisions. Nevertheless, for each, the one-year discovery period must begin to run from April 30, 1971, when notice of the court's order and the Rescission Offer was sent. However incomplete that notice might have been, as plaintiffs allege, it encompassed enough of a "storm warning" to start the clock as a matter of law. Their complaint, filed on March 30, 1973, was thus untimely.

Consequently, Joseph Bennett's claim, added by amendment to the Anixter Action on May 24, 1974, is tethered to a nullity. Indeed, had the Anixter Action been timely, Mr. Bennett would have had one year from its filing or until March 30, 1974, to have filed his complaint on time. Surely the filing of the Anixter Action was notice sufficient to trigger the one-year statute of limitations. *Peterson, Lowry*, 651 F.2d at 687.

IV. Section 10(b)

Defendants challenged plaintiffs' Section 10(b) and Rule 10b-5 claims as untimely under both the Oklahoma statute

of limitations for fraud and the one-year/three-year uniform federal scheme, as announced by the Third Circuit in *Data Access*, 843 F.2d 1537. Our disposition of this issue is now guided by the Supreme Court's recent decision resolving a split among the Circuits over whether the state borrowing doctrine is the appropriate vehicle for determining the limitary period for implied federal securities causes of action. *Lampf, Pleva*, ___ S. Ct. ___ (1991 WL 105240). The Court concluded the proper limitations period for Section 10(b) and Rule 10b-5 claims is the more closely analogous uniform federal period for express causes of action contained in the 1933 and 1934 Acts.

In *Lampf, Pleva*, from 1979 through 1981, plaintiffs invested in certain limited partnerships to develop computer hardware and software with "the expectation of realizing federal income tax benefits therefrom." *Id.* The partnerships failed, and in 1982 and 1983, the IRS notified plaintiffs of its investigation of the partnerships. Subsequently, the claimed tax benefits were disallowed because of overvaluation of partnership assets and lack of a profit motive. On November 3, 1986, and June 4, 1987, plaintiffs filed complaints in federal court alleging they were induced to invest in the partnerships by misrepresentations in the offering memoranda in violation of Section 10(b) and Rule 10b-5. Plaintiffs stated they only discovered the alleged misrepresentations in 1985 when the IRS disallowed their deductions. The district court disagreed and dismissed their complaints upon finding plaintiffs were on inquiry notice as early as 1982 when they became aware of the possibility of fraud and misconduct in the partnerships. The Ninth Circuit reversed on the ground that unresolved factual issues precluded summary judgment on the question of when plaintiffs discovered or should have discovered the alleged fraud. *Reitz v. Leasing Consultants Assocs.*, 895 F.2d 1418 (9th Cir. 1990).

Reversing the Ninth Circuit, the Supreme Court rejected the long-standing judicial practice of looking to state ana-

logues to a securities fraud action and borrowing the appropriate state statute of limitations for that cause of action. Additionally, the Court rejected the Solicitor General's argument to apply the federal limitation of Section 13 but with the five-year statute of repose established for Section 20A, 15 U.S.C. § 78t-1(b)(4).[41] Instead, the Court reasoned, quoting *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169 (1983),

> [i]n the present litigation, there can be no doubt that the contemporaneously enacted express remedial provisions represent "a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels."

Id. The Court held the one-year/three-year scheme of the 1933 and 1934 Acts was the more appropriate limitations period for Section 10(b).[42]

Furthermore, the Court rejected plaintiffs' argument that the express period would be subject to the doctrine of equitable tolling. "Notwithstanding this venerable principle, it is evident that the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure. . . . The 3-year limit is a period of repose inconsistent with tolling." *Lampf, Pleva*, ___ S. Ct. ___ (1991 WL 105240). Therefore, the Court held plaintiffs' claims were untimely.

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[41] Section 20A(b)(4) of the 1934 Act, added by the Insider Trading and Securities Fraud Enforcement Act of 1988, provides: "No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation."

[42] *Ceres Partners v. GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990); and *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d Cir.), *cert. denied, sub nom., Vitiello v. I. Kahlowski & Co.*, 488 U.S. 849 (1988), had reached the same conclusion.

Thus, *Hackbart v. Holmes*, 675 F.2d 1114 (10th Cir. 1982), and *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817 (10th Cir. 1990) (per curiam), no longer govern our analysis of the applicable limitary period for plaintiffs' Section 10(b) claims in our case. Consequently, based on our prior discussion of Section 13 to plaintiffs' express causes of action, we hold plaintiffs' Section 10(b) and Rule 10b-5 claims are untimely and must be dismissed.

V. Conclusion

In their joint brief and oral argument, plaintiffs urged we compare the levels of inequity in reaching a result in this case. The federal securities scheme sought to ensure full disclosure and prohibit manipulative and deceptive practices, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204-05 (1976), not by comparing levels of inequity but by determining whether the cause of action asserted falls within that remedial scheme. Although our result appears the more draconian given the eighteen years consumed in reaching it, we cannot overlook Congress' clear design in setting that outer limit which ultimately snared plaintiffs' claims. Any alteration of that design is committed solely to the body that enacted it and not the court.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 90-5040 - 90-5049, 90-5051, 90-5053, 90-5055 - 90-5059, 90-5062 - 90-5067

IVAN A. ANIXTER, et al.,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, et al.,
Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr., et al.,
Defendants-Appellants.

ORDER ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* AND MOTION OF THE SECURITIES AND EXCHANGE COMMISSION FOR LEAVE TO FILE A MEMORANDUM AS *AMICUS CURIAE*

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

MOORE, Circuit Judge.

Before us are plaintiffs' petition for rehearing and suggestion for rehearing en banc and the Securities and Exchange Commission's (SEC) motion for leave to file a brief as amicus curiae in support of plaintiffs' petition for re-

hearing. Plaintiffs' petition for rehearing is granted in part in order to clarify our prior opinion to reference the language of Section 9(e) of the Securities Exchange Act of 1934 (the 1934 Act) in accord with the Supreme Court's recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___ , 111 S. Ct. 2773 (1991), and to dispose of the issue of the retroactive application of *Lampf, Pleva*. With respect to all other issues raised by plaintiffs, the petition is denied. We grant the SEC's motion for leave to file an amicus brief.

In our prior opinion, we stated, "the one-year/three-year scheme of the 1933 and 1934 Acts was the more appropriate limitations period for Section 10(b)," without specifying § 9(e) of the 1934 Act. *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, ___ (10th Cir. 1991). However, in rejecting Tenth Circuit precedent on the applicable statute of limitations under § 10(b), the order referred to our previous discussion under Section 13 of the Securities Act of 1933 (the 1933 Act), as amended by the 1934 Act, to supply the rationale for dismissing plaintiffs' implied cause of action on statute of limitations grounds. *Id.* We amend that order to include the following discussion.

In deciding to analogize the statute of limitations under § 10(b) of the 1934 Act to one of the express limitary periods found in the 1933 and 1934 Acts, the Court, in *Lampf, Pleva*, noted that each express cause of action included explicit and similar limitations periods. "With only one more restrictive exception,[1] each of these includes some

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[1] The more restrictive section, the Court noted, is Section 16(b), 15 U.S.C. § 78p(b), which "sets a 2-year rather than a 3-year period of repose. Because that provision requires the disgorgement of unlawful profits and differs in focus from § 10(b) and from the other express causes of action, we do not find § 16(b) to be an appropriate source from which to borrow a limitations period here." *Lampf, Pleva*, 111 S. Ct. at 2780, n.5. The one-year, three-year designs, the Court stated, were found in Section 9(e) and Section 18(c) of the 1934 Act and Section 13 of the 1933 Act, as amended in 1934.

variation of a 1-year period after discovery combined with a 3-year period of repose." *Id.* at 2780. From among these one-year, three-year provisions and "[t]o the extent that these distinctions in the future might prove significant," *id.* at 2782, n.9, the Court selected § 9(e), 15 U.S.C. § 78i(e) as the "governing standard for an action under § 10(b)." [2] *Id.* In arriving at this conclusion, the Court expressly agreed with "every Court of Appeals that has been called upon to apply a federal statute of limitations to a § 10(b) claim that the express causes of action contained in the 1933 and 1934 Acts provide a more appropriate statute of limitations than does § 20A." *Id.* at 2781.[3]

Despite the Court's recognition of the substantial similarity of the wording of these express limitary periods, plaintiffs contend the slightly different wording of § 9(e), in fact, calls for "actual notice" while the language of § 13 requires only inquiry notice. We find no such distinction; nor did the Court in *Lampf, Pleva.*

Instead, in *Lampf, Pleva*, the Court observed, "Although not identical in language, all these [express statutes of limitations] relate to one year after discovery and to three years after violation." *Id.* at 2777, n.2. When the Court selected § 9(e), it did not necessarily indicate a preference

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[2] Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), states: "No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation."

[3] The Court cited *Ceres Partners v. GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990) (borrowing 1934 Act's one-year/three-year period for express rights of action under §§ 9(e) and 18(A) provides the closer analogy given federal policies underlying federal securities laws); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991), (borrowing § 13 statute of limitations as the closer analogue for §10(b)); *In re Data Access Systems Sec. Litig.*, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988) (§ 9(e), one year after discovery of facts constituting the violation, and in no event more than three years after such violation, is proper period of limitations).

for the type of notice of the violation[4] but sought a "governing" standard to link the implied § 10(b) remedy to those express securities causes of action which uniformly require one year after notice of the violation and not more than three years after the violation.

Thus, under *Lampf, Pleva*, in overlaying an implied remedy to their express causes of action, plaintiffs were required to show their complaint was timely filed within one year of their notice of the violation, when they knew or should have known, and no later than three years after the violation.[5] Our previous analysis of when plaintiffs were on notice of the violation remains applicable to their §10(b) claims. Indeed, under the analysis set forth in *Lampf, Pleva*, the Anixter plaintiffs' § 10(b) cause of action is, therefore, untimely filed.

Moreover, in *Lampf, Pleva*, after resolving a split in the Circuits, the Court applied the decision to the case before it. On the same day, in *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 2439, 2448 (1991), a plurality opinion, the Court grounded the question of retroactivity "entirely to an issue of choice of law" and stated, "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others

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[4] The Court cited with approval the discussion in *Short v. Belleville Shoe*, 908 F.2d at 1385, which borrowed the § 13 statute of limitations.

[5] Federal law governs when a cause of action accrues. *Rawlings v. Ray*, 312 U.S. 96 (1941). It would appear that the general rule for this determination in federal court is an objective test, knows or should have known; discovers or in the exercise of reasonable diligence should discover, the facts giving rise to the claim. The distinction is often blurred. For example, in *Dzenits v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir. 1974), to decide whether the state statute of limitations had run on a 10(b) claim, the court stated, "[T]he crucial issue of fact with respect to the commencement of the running of the applicable two-year statute of limitations is when the plaintiff actually knew, or in the exercise of reasonable diligence should have known . . . ."

not barred by procedural requirements or res judicata." A week later, the Court granted a writ of certiorari in *Welch v. Cadre Capital*, 923 F.2d 989 (2d Cir. 1991), which had held that *Ceres Partners v. GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990), met "the threshold [Chevron] requirement for nonretroactive application." 923 F.2d at 994. The Court vacated and remanded the case for further consideration in light of the discussion in *James Beam* and *Lampf, Pleva. Northwest Savings Bank v. Welch*, ___ U.S. ___, 111 S. Ct. 2882 (1991). Consequently, the Court has resolved the issue of retroactivity.

Finding no merit in plaintiffs' additional assertions of error, we therefore amend the order as noted and deny the petition for rehearing. The SEC's motion for leave to file a memorandum as amicus curiae is granted.

The suggestion for rehearing en banc was submitted to the entire court in accordance with Fed. R. App. P. 35(b), but no judge in regular active service sought rehearing en banc. Judges Holloway and Seymour did not participate.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 90-5040 - 90-5049, 90-5051, 90-5053, 90-5055 - 90-5059, 90-5062 - 90-5067

IVAN A. ANIXTER, et al.,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, et al.,
Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr., et al.,
Defendants-Appellants.

ORDER

Filed January 6, 1992

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

Appellees' motion to recall the mandate and petition for rehearing are denied. Appellants' motion for extension of time is moot.

Entered for the Court
ROBERT L. HOECKER, Clerk

By: /s/
Patrick Fisher, Chief Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

M.D.L. 153
ALL CASES

In Re:

HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION

ORDER

The Court having received the jury's verdicts and answers to special interrogatories on statutes of limitations and equitable estoppel on September 2, 1988, and having reviewed and considered the parties' previously filed briefs and arguments with respect to the statute of limitations issues under (i) section 11 of the Securities Act of 1933 (the "1933 Act"), (ii) section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), and Rule 10b-5 thereunder, and (iii) common law negligence, hereby finds and orders:

(1) Based on the jury's findings that the class representatives for the 1964 through 1972 classes, both individually and in their representative capacity, did not discover nor should have discovered by the exercise of reasonable diligence until September, 1973, that defendants Robert S. Trippet, Frank E. Sims, Elmer M. Kunkel, Cross & Company, Norman C. Cross, Jr. and Kothe & Eagleton, Inc. violated or aided and abetted a violation of Rule 10b-5, the claims asserted under section 10(b) of the 1934 Act and Rule 10b-5 thereunder against those defendants by the nine class representatives, both on behalf of them-

selves and the classes they represent, are not time-barred by the applicable statutes of limitation.

(2) Based on the jury's findings that the class representatives for the 1964 through 1972 classes, both individually and in their representative capacity, did not discover nor should have discovered by the exercise of reasonable diligence until September, 1973, that with respect to the claims against defendants Robert S. Trippet, Frank E. Sims, Cross & Company, Norman C. Cross, Jr., Kothe & Eagleton, Inc. and Elmer M. Kunkel under section 11 of the 1933 Act, any part of the registration statements for the 1964 through 1972 Programs, including specifically those parts prepared or certified by defendants, Cross & Company, Norman C. Cross, Jr., Kothe & Eagleton, Inc. and Elmer M. Kunkel, misstated or omitted material facts in violation of section 11, the claims asserted under section 11 of the 1933 Act against those defendants by the nine class representatives, both on behalf of themselves and the classes they represent, are not time-barred under section 13 of the 1933 Act because of defendants' fraudulent concealment of plaintiffs' causes of action and the doctrine of equitable tolling.

(3) Based on the jury verdicts (i) against defendants Kunkel and Cross with respect to negligence claims asserted against them in the individual actions, Case Nos. 74-C-224, 74-C-225, 74-C-226, 74-C-229, 74-C-180, 74-C-230, and (ii) on the section 11 and the Rule 10b-5 claims asserted in those cases and Case Nos. 74-C-227 and 74-C-228 against defendants Trippet, Cross and Kunkel, in light of the Court's instructions, such claims are not time-barred by the applicable statutes of limitations.

(4) Alternatively, based both on the jury's findings that defendants Trippet and Kunkel, assisted by other officers of Home-Stake Production Company, intentionally thwarted and defeated the federal courts, the SEC and the IRS in their efforts to administer and enforce the laws of the

United States in connection with the offering and sale of Home-Stake programs and on the Court's own hearing and evaluation of the evidence on that subject, including the assistance in that course of conduct rendered by Cross & Company, Norman C. Cross, Jr., Elmer M. Kunkel (as Home-Stake's outside auditor), and Kothe and Eagleton, Inc. by their participation in the preparation and certification of financial statements or legal opinions contained in and the drafting of the registration statements for the various programs, defendants are estopped from raising statute of limitations defenses to the claims asserted against them under section 11 of the 1933 Act, section 10(b) of the 1934 Act and Rule 10b-5 thereunder and common law negligence.

/s/ _____
Manuel L. Real, Chief Judge
United States District Court
Central District of California

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

M.D.L. 153

73-C-382 and 73-C-377
(Consolidated)

74-C-180, .74-C-224, 74-C-225, 74-C-226, 74-C-227, 74-C-229 and 74-C-230

In Re:

HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION

FINAL JUDGMENT

Based on the jury's verdicts dated September 2, 1988, and May 19, 1989, and the Court's Order on Motion For Partial Summary Judgment on Damages (filed March 15, 1989), as amended by the Order of March 31, 1989 (filed May 4, 1989), and further based on Plaintiffs' Motion For Entry of Judgments Pursuant to Rules 56 and 58, filed June 28, 1989, the briefs and arguments of the parties with respect thereto, and the Court's rulings in open court on November 9, 1989, with respect to the allowance of prejudgment interest,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the members of the nine program classes in the *Anixter* action shall recover from the defendants listed below the following aggregate amounts (including, in the exercise of the Court's discretion, prejudgment interest in the amounts set forth below) on the following claims. The share of each *Anixter* class member in the judgments set out below shall be as set forth in the applicable schedules attached to this judgment.

Anixter, et al. v. Home-Stake Production Co., et al., Case Nos. 73-C-382 and 73-C-377 (Consolidated).

Defendant(s) Liable	Program (No. of Units)	Claim	Amount
Robert S. Trippet Elmer M. Kunkel	1964 (248.52 Units)	Section 11[1]	$2,197,177.13
		Prejudgment interest	$6,923,411.28 plus $656.91 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Frank E. Sims	1964 (248.52 Units)	Rule 10b-5[2]	$2,246,836.12
		Prejudgment interest	$7,010,925.53 plus $671.76 per day from July 1, 1989 through the date of entry of this judgment

[1] Reference is to section 11 of the Securities Act of 1933, 15 U.S.C. § 77k.

[2] Reference is to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

Robert S. Trippet Elmer M. Kunkel	1965 (274.31 Units)	Section 11	$2,268,825.73
		Prejudgment interest	$8,408,139.86 plus $678.34 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Frank E. Sims	1965 (274.31 Units)	Rule 10b-5	$2,268,825.73
		Prejudgment interest	$8,408,139.86 plus $678.34 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Elmer M. Kunkel	1966 (321.1 Units)	Section 11	$2,884,880.32
		Prejudgment interest	$9,877,418.20 plus $862.44 per day from July 1, 1989 through the date of entry of this judgment

Robert S. Trippet Frank E. Sims	1966 (321.1 Units)	Rule 10b-5	$2,884,880.32
		Prejudgment interest	$9,877,418.20 plus $862.44 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet	1967 (351.05 Units)	Section 11	$1,236,629.11
		Prejudgment interest	$9,736,200.42 plus $369.80 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Frank E. Sims	1967 (351.05 Units)	Rule 10b-5	$1,236,629.11
		Prejudgment interest	$9,736,200.42 plus $369.80 per day from July 1, 1989 through the date of entry of this judgment

Robert S. Trippet	1968 (541.71 Units)	Section 11	$4,704,418.52
		Prejudgment interest	$15,126,916.07 plus $1,406.50 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Frank E. Sims	1968 (541.71 Units)	Rule 10b-5	$4,704,418.52
		Prejudgment interest	$15,126,916.07 plus $1,406.50 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Elmer M. Kunkel Wynema Anna Cross as Executrix of the Estate of Norman C. Cross, Jr. (hereinafter referred to as "Estate of Cross")	1969 (628.77 Units)	Section 11	$6,014,978.10
		Prejudgment interest	$18,729,195.57 plus $1,798.70 per day from July 1, 1989 through the date of entry of this judgment

Robert S. Trippet Frank E. Sims Elmer M. Kunkel Estate of Cross	1969 (628.77 Units)	Rule 10b-5	$6,014,978.10
		Prejudgment interest	$18,729,195.57 plus $1,798.70 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Elmer M. Kunkel Estate of Cross	1970 (655.84 Units)	Section 11	$4,727,067.19
		Prejudgment interest	$17,496,406.26 plus $1,413.27 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Frank E. Sims Elmer M. Kunkel Estate of Cross	1970 (655.84 Units)	Rule 10b-5	$4,804,705.27
		Prejudgment interest	$17,612,793.06 plus $1,436.51 per day from July 1, 1989 through the date of entry of this judgment

Robert S. Trippet Estate of Cross	1971 (457.33 Units)	Section 11	$2,592,422.68
		Prejudgment interest	$10,804,882.97 plus $775.07 per day from July 1, 1989 through the date of entry of this judgment
Kothe & Eagleton, Inc.	1971 (457.33 Units)	Section 11	$3,223,801.83
		Prejudgment interest	$11,826,217.90 plus $963.84 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Frank E. Sims Estate of Cross Kothe & Eagleton, Inc.	1971 (457.33 Units)	Rule 10b-5	$2,481,302.14
		Prejudgment interest	$10,660,525.65 plus $741.66 per day from July 1, 1989 through the date of entry of this judgment

Robert S. Trippet Frank E. Sims Cross & Company	1972 (514.25 Units)	Section 11	$418,078.38
		Prejudgment interest	$2,179,828.36 plus $124.76 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Frank E. Sims Cross & Company	1972 (514.25 Units)	Rule 10b-5	$418,078.38
		Prejudgment interest	$2,179,828.36 plus $124.76 per day from July 1, 1989 through the date of entry of this judgment

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs in the following individual actions shall recover from the defendants listed below the following aggregate amounts (including, in the exercise of the Court's discretion, prejudgment interest in the amounts set forth below) on the following claims. The share of each plaintiff in the judgments set out below shall be as set forth in the applicable schedules attached to this judgement.

Blesh, et al. v. Home-Stake Production Co., et al., Case No. 74-C-224.

Defendant(s) Liable	Program (No. of Units)	Claim	Amount
Robert S. Trippet	1964 (10.5 Units)	Rule 10b-5	$78,849.91
		Prejudgment interest	$259,017.73 plus $23.58 per day from July 1, 1989 through the date of entry of this judgment
Elmer M. Kunkel	1964 (10.5 Units)	Negligence	$78,849.91
		Prejudgment interest	$259,017.73 plus $23.58 per day from July 1, 1989 through the date of entry of this judgment

Blesh, et al. v. Home-Stake Production Co., et al., Case No. 74-C-225.

Defendant(s) Liable	Program (No. of Units)	Claim	Amount
Robert S. Trippet	1965 (31.71 Units)	Rule 10b-5	$259,595.54
		Prejudgment interest	$927,460.15, plus $77.63 per day from July 1, 1989 through the date of entry of this judgment
Elmer M. Kunkel	1965 (31.71 Units)	Negligence	$259,595.54
		Prejudgment interest	$927,460.15, plus $77.63 per day from July 1, 1989 through the date of entry of this judgment

Anton, et al. v. Home-Stake Production Co., et al., Case No. 74-C-226.

Defendant(s) Liable	Program (No. of Units)	Claim	Amount
Robert S. Trippet	1966 (15 Units)	Rule 10b-5	$141,300.06
		Prejudgment interest	$460,953.02, plus $42.25 per day from July 1, 1989 through the date of entry of this judgment
Elmer M. Kunkel	1966 (15 Units)	Negligence	$141,300.06
		Prejudgment interest	$460,953.02, plus $42.25 per day from July 1, 1989 through the date of entry of this judgment

Anton, et al. v. Home-Stake Production Co., et al., Case No. 74-C-227.

Defendant(s) Liable	Program (No. of Units)	Claim	Amount
Robert S. Trippet	1967 (1.5 Units)	Rule 10b-5	$5,061.71
		Prejudgment interest	$40,175.37, plus $1.51 per day from July 1, 1989 through the date of entry of this judgment

Anderson, et al. v. Home-Stake Production Co., et al., Case No. 74-C-228.

Defendant(s) Liable	Program (No. of Units)	Claim	Amount
Robert S. Trippet	1968 (3.2 Units)	Rule 10b-5	$28,325.84
		Prejudgment interest	$91,622.58, plus $8.47 per day from July 1, 1989 through the date of entry of this judgment

Anderson, et al. v. Home-Stake Production Co., et al., Case No. 74-C-229.

Defendant(s) Liable	Program (No. of Units)	Claim	Amount
Robert S. Trippet	1969 (2.5 Units)	Rule 10b-5	$23,830.81
		Prejudgment interest	$74,513.28, plus $7.13 per day from July 1, 1989 through the date of entry of this judgment
Estate of Cross	1969 (2.5 Units)	Negligence	$23,830.81
		Prejudgment interest	$74,513.28, plus $7.13 per day from July 1, 1989 through the date of entry of this judgment

Defendant(s) Liable	Program No. of Units)	Claim	Amount
Robert S. Trippet Estate of Cross	1970 (5 Units)	Rule 10b-5	$39,344.09
		Prejudgment interest	$134,548.66, plus $11.76 per day from July 1, 1989 through the date of entry of this judgment
Robert S. Trippet Elmer M. Kunkel Estate of Cross	1970 (5 Units)	Section 11	$43,886.74
		Prejudgment interest	$141,680.41, plus $13.12 per day from July 1, 1989 through the date of entry of this judgment
Estate of Cross	1970 (5 Units)	Negligence	$39,344.09
		Prejudgment interest	$134,548.66, plus $11.76 per day from July 1, 1989 through the date of entry of this judgment

Bank of America, et al. v. Home-Stake Production Co., et al., Case No. 74-C-230.

Defendant(s) Liable	Program (No. of Units)	Claim	Amount
Robert S. Trippet Estate of Cross	1971 (1 Unit)	Section 11	$8,006.82
		Prejudgment interest	$28,424.57, plus $2.39 per day from July 1, 1989 through the date of entry of this judgment
Estate of Cross	1971 (1 Unit)	Negligence	$6,383.25
		Prejudgment interest	$25,875.63, plus $1.91 per day from July 1, 1989 through the date of entry of this judgment

As to each of the above judgments with respect to claims for which more than one defendant is listed as liable, such liability shall be joint and several among all the defendants so listed.

With respect to the plaintiffs' claims in the *Anixter* action under both Section 11 and Rule 10b-5 against defendants Trippet (for the 1964 through 1972 program units), Sims (for the 1972 program units), Kunkel (for the 1969 and 1970 program units), Norman C. Cross, Jr. (for the 1969 through 1971 program units), Cross & Company (for the 1972 program units) and Kothe & Eagleton, Inc. (for the 1971 program units), the foregoing judgments are, in part, duplicative. This Order shall not be construed to permit double recovery of damages from the same defendant for the same program units.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that there is no just reason for delay in entering the foregoing as final judgments in these cases and the Clerk is hereby directed to enter judgments against the above listed defendants in the amounts and on the claims specified herein. The Court retains jurisdiction to resolve all matters remaining undetermined in any of the cases consolidated in M.D.L. Docket No. 153, including but not limited to the proposed *Anixter* settlements with Kent M. Klineman and Marvin R. Barnett, approval of applications to distribute any amounts remaining undistributed from prior settlements in these actions and any applications that may be made regarding attorneys fees and expenses.

DATED: November 15, 1989

JUDGMENT ENTERED: /s/ _____
MANUEL L. REAL, Chief Judge
United States District Court
Central District of California

_____
Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

M.D.L. NO. 153
ALL CASES

IN RE:

HOME-STAKE PRODUCTION COMPANY
SECURITIES LITIGATION.

SPECIAL JURY INTERROGATORIES
EQUITABLE ESTOPPEL

Do you find that Robert S. Trippet, as President, Elmer M. Kunkel, as Chief Financial Officer, and other officers of Home-Stake Production Company intended to and did thwart and defeat the federal courts in their purpose to ensure the fair and proper administration of justice?

Yes X No ____

Do you find that Robert S. Trippet, as President, Elmer M. Kunkel, as Chief Financial Officer, and other officers of Home-Stake Production Company intended to and did thwart and defeat the Securities Exchange Commission in its purpose of enforcing the securities laws of the United States?

Yes X No ____

Do you find that Robert S. Trippet, as President, Elmer M. Kunkel, as Chief Financial Officer, and other officers of Home-Stake Production Company intended to and did thwart and defeat the Internal Revenue Service in its purpose of enforcing the internal revenue laws of the United States?

Yes X No ____

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

M.D.L. NO. 153
73-C-382, 73-C-377
(Consolidated)

IN RE:

HOME-STAKE PRODUCTION COMPANY
SECURITIES LITIGATION.

SPECIAL JURY INTERROGATORIES ON STATUTES OF LIMITATIONS

Special Interrogatories:
1972, Rule 10b-5, Trippet

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972,* that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972,* that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

Special Interrogatories:
1972, Rule 10b-5, Sims

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

Special Interrogatories:
1972, Rule 10b-5, Cross & Co.

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individuall· and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Cross & Company violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Cross & Company violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Cross & Company violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Cross & Company violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

Special Interrogatories:
1971, Rule 10b-5, Trippet

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

Special Interrogatories:
1971, Rule 10b-5, Sims

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

Special Interrogatories:
1971, Rule 10b-5, Kothe & Eagleton

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Kothe & Eagleton violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Kothe & Eagleton violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Kothe & Eagleton violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

Special Interrogatories:
1971, Rule 10b-5, Cross

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

Special Interrogatories:
1970, Rule 10b-5, Trippet

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

Special Interrogatories:
1970, Rule 10b-5, Cross

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

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Special Interrogatories:
1970, Rule 10b-5, Sims

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

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Yes ____ No ____

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and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971,* that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

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Special Interrogatories:
1970, Rule 10b-5, Kunkel

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

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Yes ____ No ____

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Special Interrogatories:
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Special Interrogatories:
1969, Rule 10b-5, Kunkel

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Yes _____ No _____

(Please turn to the next page)

Special Interrogatories:
1968, Rule 10b-5, Trippet

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

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Yes _____ No _____

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Special Interrogatories:
1968, Rule 10b-5, Sims

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Yes _____ No _____

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Special Interrogatories:
1967, Rule 10b-5, Trippet

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

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(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

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Yes _____ No _____

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Special Interrogatories:
1967, Rule 10b-5, Sims

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Yes _____ No _____

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Special Interrogatories:
1966, Rule 10b-5, Trippet

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

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Special Interrogatories:
1966, Rule 10b-5, Kunkel

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Yes _____ No _____

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Special Interrogatories:
1965, Rule 10b-5, Trippet

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

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Yes _____ No _____

(Please turn to the next page)

Special Interrogatories:
1964, Rule 10b-5, Trippet

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

Special Interrogatories:
1964, Rule 10b-5, Sims

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

Special Interrogatories:
1964, Rule 10b-5, Kunkel

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable

diligence, *until at least March 31, 1970*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

Special Interrogatories:
1972, Section 11, Trippet

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1972 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least May 26, 1973*, that any part of the 1972 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1972, Section 11, Frank E. Sims and Donald C. Larrabee

With respect to plaintiffs' claims against Frank E. Sims and Donald C. Larrabee under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1972 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Frank E. Sims and Donald C. Larrabee under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least May 26, 1973*, that any part of the 1972 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1972, Section 11, Cross & Company

With respect to plaintiffs' claims against Cross & Company under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1972 Registration Statement prepared or certified by Cross & Company as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Cross & Company under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least May 26, 1973*, that the part of the 1972 Registration Statement prepared or certified by Cross & Company as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1971, Section 11, Trippet

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1971 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1971 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1971, Section 11, Kothe & Eagleton, Inc.

With respect to plaintiffs' claims against Kothe & Eagleton, Inc. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1971 Registration Statement prepared or certified by Kothe & Eagleton, Inc. as attorneys misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Kothe & Eagleton, Inc. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least May 26, 1973*, that any part of the 1971 Registration Statement prepared or certified by Kothe & Eagleton, Inc. as attorneys misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1971, Section 11, Norman C. Cross, Jr.

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1971 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1971 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1970, Section 11, Trippet and Kunkel

With respect to plaintiffs' claims against Robert S. Trippet and Elmer Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1970 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet and Elmer Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1970 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1970, Section 11, Norman C. Cross, Jr.

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1970 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that the part of the 1970 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1969, Section 11, Trippet and Kunkel

With respect to plaintiffs' claims against Robert S. Trippet and Elmer Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1969 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet and Elmer Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1969 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1969, Section 11, Norman C. Cross, Jr.

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1969 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that the part of the 1969 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1968, Section 11, Trippet

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1968 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1968 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1967, Section 11, Trippet

With respect to plaintiffs' claims against Robert S. Trippet, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1967 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1967 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1966, Section 11, Trippet

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1966 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1966 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1966, Section 11, Elmer M. Kunkel

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1966 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that the part of the 1966 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1965, Section 11, Trippet

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1965 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that any part of the 1965 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1965, Section 11, Elmer M. Kunkel

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1965 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that the part of the 1965 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

Special Interrogatories:
1964, Section 11, Trippet

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1964 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that any part of the 1964 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that any part of the 1964 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _____ No _____

(Please turn to next page)

Special Interrogatories:
1964, Section 11, Elmer M. Kunkel

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1964 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that the part of the 1964 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that the part of the 1964 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes _____ No _____

(Please sign below)

_____

Dated: FOREPERSON

APPENDIX H

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. Section 11 of the Securities Act of 1933, as codified at 15 U.S.C. § 77k, provides:

Persons possessing cause of action: persons liable

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

Persons exempt from liability upon proof of issues

(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to

act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert;

and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

Standard of reasonableness

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

Effective date of registration statement with regard to underwriters

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

Measure of damages: undertaking for payment of costs

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in

which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

Joint and several liability

(f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

Offering price to public as maximum amount recoverable

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

3. Section 13 of the Securities Act of 1933, as codified at 15 U.S.C. § 77m, provides:

No action shall be maintained to enforce any liability created under section 77k or 77l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(2) of this title more than three years after the sale.

4. Section 9(e) of the Securities Exchange Act of 1934, as codified at 15 U.S.C. § 78i(e), provides:

(e) Any person who willfully participates in any act or transaction in violation of subsection (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

5. Section 10(b) of the Securities Exchange Act of 1934, as codified at 15 U.S.C. § 78j, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

6. Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, 105 Stat. 2236, 2387 (1991), provides:

The Securities Exchange Act of 1934 is amended by inserting after section 27 (15 U.S.C. 78aa) the following new section:

"SPECIAL PROVISION RELATING TO STATUTE OF LIMITATIONS ON PRIVATE CAUSES OF ACTION"

"Sec. 27A. (a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

"(b) EFFECT ON DISMISSED CAUSES OF ACTION.—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—

"(1) which was dismissed as time barred subsequent to June 19, 1991, and

> "(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section."

7. SEC Rule 10b-5, 17 C.F.R. 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(3)

No. 91-1340

Supreme Court, U.S.
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In The Supreme Court of the United States
October Term, 1991

WILLIAM H. DENNLER, et al.,

Petitioners,

v.

ROBERT S. TRIPPET, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JACK L. MCNULTY
THOMAS M. AFFELDT
SAVAGE, O'DONNELL, SCOTT,
MCNULTY, AFFELDT & GENTGES
601 S. Boulder, Suite 1100
Tulsa, OK 74119
(918) 599-9000
For E. M. Kunkel

JULIAN C. CAMPBELL
D. KENDALL GRIFFITH
NANCY G. LISCHER
HINSHAW & CULBERTSON
222 N. LaSalle Street, Suite 300
Chicago, IL 60601-1081
(312) 704-3000
For Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr.

B. HAYDEN CRAWFORD
Counsel of Record
ROBERT L. BAINBRIDGE
KYLE B. HASKINS
CRAWFORD, CROWE
& BAINBRIDGE, P.A.
15 East 5th Street, Suite 1714
Tulsa, OK 74103
(918) 587-1128
For Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr. and Cross and Company

STAN P. DOYLE
JAMES C. THOMAS
DOYLE & HARRIS
P.O. Box 1679
Tulsa, OK 74101
(918) 743-1276
For Kothe & Eagleton, Inc.

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TABLE OF CONTENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

I. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT CERTIORARI REVIEW OF THE PETITIONERS' CLAIMS UNDER §27A OF THE 1934 ACT 5

II. PETITIONERS' SECOND QUESTION DEMONSTRATES NO CONFLICT AMONG THE CIRCUITS, IS BASED PRIMARILY UPON FACTUAL ISSUES AND PRESENTS NO IMPORTANT FEDERAL OR CONSTITUTIONAL ISSUES 8

A. There Is No Conflict Among the Circuits 8

B. Petitioners' Second Question Is Based Primarily Upon Facts Properly Considered by the Tenth Circuit 9

C. The Tenth Circuit's Decision Does Not Violate the Seventh Amendment 11

D. The Tenth Circuit's Holding Does Not Violate Congressional Policies 14

III. THE DECISION OF THE TENTH CIRCUIT REGARDING §13 AND EQUITABLE ESTOPPEL IS NOT CONTRARY TO NOR IN CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUITS 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases *Page*

Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir. 1980) 14

Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977) 8, 9

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, *reh'g denied*, 369 U.S. 882 (1962) 13

Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975) 9

Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc., 584 F.2d 946 (10th Cir. 1978) 12

Bomba v. W. L. Belvidere. Inc., 579 F.2d 1067 (7th Cir. 1978) 16

Brady v. Southern R. Co., 320 U.S. 476 (1943) 12

Cerbone v. Int'l Ladies Garment Workers' Union, 768 F.2d 45 (2d Cir. 1985) 15

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 6

Curry v. A. H. Robins Co., 775 F.2d 212 (7th Cir. 1985) 12

In re Data Access Sys. Sec. Litigation, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988) 7

English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988) 14

Gaudin v. KDI Corp., 576 F.2d 708 (6th Cir. 1978) 9

Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959) 14, 16

Hodges v. Snyder, 261 U.S. 600 (1923) 7

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) 7

Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974) 9

Page

James B. Beam Distilling Co. v. Georgia, 501 U.S. ___, 111 S.Ct. 2439 (1991) 6

Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979) 9

Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir. 1969) 16

Kennedy v. Tallant, 710 F.2d 711 (11th Cir. 1983) 9

Kramas v. Sec. Gas & Oil, Inc., 672 F.2d 766 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982) 12

Lampf Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. ___, 111 S.Ct. 2773, *reh'g denied*, 501 U.S. ___, 112 S.Ct. 27 (1991) 6, 14, 16

Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985) 12

Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1949) 7

McCullough v. Virginia, 172 U.S. 102 (1898) 7

Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) 12, 13

Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, *reh'g denied*, 386 U.S. 1027 (1967) 12, 13

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 6, 13

Randall v. Loftsgaarden, 478 U.S. 647 (1986) 7

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 11

Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979) 8, 9, 11, 13

SEC v. Seaboard Corp., 677 F.2d 1301 (9th Cir. 1982) 15

Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 501 U.S. ___, 111 S.Ct. 2887 (1991) 16

Page

Stewart v. Keyes, 295 U.S. 403, *reh'g denied*, 296 U.S. 661 (1935) 7

Summer v. Land & Leisure, Inc., 664 F.2d 965 (5th Cir. Unit B 1981), *cert. denied sub nom, Arthur Young & Co. v. Summer*, 458 U.S. 1106 (1982) 15

Tull v. United States, 481 U.S. 412 (1987) 12

United States v. Johnston, 268 U.S. 220 (1925) 11

United States v. Klein, 80 U.S. (13 Wall) 128 (1872) 7

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 7

Zobel v. Williams, 457 U.S. 55 (1982) 7

Constitutional Provisions

U.S. Const. art. III 2, 7

U.S. Const. art. VI cl. 2 ..... 2, 7

U.S. Const. amend. V 2, 7

U.S. Const. amend. VII 1, 11-13

U.S. Const. amend. XIV 2, 7

Statutes

15 U.S.C. §77k 1, 8

15 U.S.C. §77m 1, 2, 8, 14, 15, 16

15 U.S.C. §78i(e) 1, 2, 8, 16

15 U.S.C. §78j(b) 1, 6

15 U.S.C. §78aa-1 ..... 1, 2, 5-7

28 U.S.C. §2106 13

Other Authorities

S. 543, 102d Cong., 1st Sess. §1126 (1991) 14

5A J. Moore, J. Lucas, *Moore's Federal Practice*, ¶50.07[1] (2d ed. 1992) 13

No. 91-1340

In The
Supreme Court of the United States
October Term, 1991

WILLIAM H. DENNLER, et al.,

Petitioners,

v.

ROBERT S. TRIPPET, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

These respondents respectfully request that the petition for a writ of certiorari be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition for writ involves §11 and §13 of the Securities Act of 1933 (15 U.S.C. §77k, §77m) ("the 1933 Act"), §9(e) and §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78i(e), §78j(b)) ("the 1934 Act") and an issue involving the seventh amendment of the United States Constitution. Petitioners raise no constitutional issues relating to §27A, which was added as an amendment to the 1934 Act by enactment of §476 of the FDIC Improvement Act of 1991 (Pub. L. No. 102-252). 15 U.S.C. §78aa-1. Respondents submit that petitioners' §27A question is not a basis for granting the petition. However, the following constitutional issues may become pertinent if a writ of certiorari

is issued on that question: (a) separation of powers clause; (b) due process clause of the fifth amendment; (c) equal protection principles; and (d) the supremacy clause. U.S. Const art. III, VI cl. 2, amend. V, XIV.

Pursuant to Supreme Court Rule 29.4(b), respondents suggest that 28 U.S.C. §2403(a) may be applicable if certiorari is granted to consider §27A. The United States Court of Appeals for the Tenth Circuit did not certify to the Attorney General that the constitutionality of an act of Congress was drawn into question.

STATEMENT OF THE CASE

This counter statement is necessary to provide a complete understanding of the issues before this Court. The Tenth Circuit's July 22, 1991 and October 21, 1991 decisions were based solely upon the issue of the statutes of limitation under §13 of the 1933 Act (App. 1-50a)[1] and §9(e) of the 1934 Act. (App. 51a-55a) Therefore, it was not necessary for the Tenth Circuit to reach other issues raised by these respondents on appeal.

From 1964 through 1972, Home-Stake Production Company ("Home-Stake"), through its Program Operating Companies ("POCs"), offered units of participation in oil and gas drilling programs ("units") which were registered under the 1933 Act.

E. M. Kunkel was the outside auditor of Home-Stake for audit years 1963-1965 (1964-1966 Program years), and an employee of Home-Stake during 1968-1971. Norman C. Cross, Jr. was the outside auditor for Home-Stake for the audit years 1968-1970 (1969-1971 Program years). Cross and Company was the outside auditor of Home-Stake for the audit year 1971 (1972 Program year). Kothe & Eagleton, Inc. served as special counsel for Home-Stake in 1971, and assisted in the preparation of the 1971 Registration Statement. (Doc. 2577; ¶¶46, 49, 50)

Home-Stake's executives sold units in face-to-face transactions with sophisticated investors in the highest income tax

---

[1] "App." refers to the separately bound appendix filed by petitioners. Citations to the record below are as follows: the trial transcript is T. ___; trial exhibits are Ex. ___; and pleadings filed in the district court are cited by docket number as Doc. ___. References to transcripts of hearings are Hr., followed by the date and page.

brackets. (T. 317-24, 353-56) Prospectuses were provided for the 1964-1972 Program years. (Ex. RD 26-27, 41-47, 410) In addition, program books, which described the drilling programs and the tax benefits being offered, were presented as a part of the sales literature for the 1964-1970 POCs. (Ex. RD 1, 3-8)

Petitioners state that the Home-Stake "Ponzi scheme forms the basis of petitioners' case." (Pet. 16) There is no finding or evidence in the record supporting the petitioners' statement that Home-Stake operated a "Ponzi scheme" to defraud investors.[2] (Pet. 4)

The Tenth Circuit's opinion did not base its determination that petitioners were on "inquiry notice" solely upon the "SEC enforcement action," as petitioners assert. (Pet. 15) Rather, the court based its decision upon the SEC fraud action and other significant facts in the record. (App. 26a, 27a, 43a n. 36, 43-46a)

The voluntary payments which petitioners refer to as the "Home-Stake fraud," were designated by Home-Stake as "pro rev" or "program revenue" payments. These payments were not represented by Home-Stake as income from oil and gas production, as petitioners argue. (Pet. 4, 25) Rather, they were represented as income from sources "other" than oil and gas production. Full disclosure of pro rev payments was made by Norman C. Cross, Jr. to the IRS, which approved and allowed pro rev payments as costs in the years that the payments were made. (Ex. OOP 54, Offer of Proof of IRS Agents; T. 3609-14)

Home-Stake disclosed the pro rev payments to petitioners in many ways, including the following:

> (1) The 1971 Prospectus filed with the SEC explained the results of prior programs as well as pro rev payments (Ex. RD 27, p. 53) by stating:
>
> > Cash returned to Investors includes funds derived from production and a return upon their capital contributions to the Programs as payment for the

---

[2] The Court: "[W]hether this is a Ponzi scheme or not I did not determine. That's argument of counsel, it is not a factual situation . . . What counsel denominated it to be is something totally outside the record and irrelevant to me. (Hr. 1-26-90, pp. 5-6)

> use of the contributed funds by Home-Stake . . . In the case of the 1965 to 1969 Programs, inclusive . . . funds derived from the latter sources have constituted virtually all of the net cash returned to Investors.
>
> (2) The stubs attached to the quarterly checks from Home-Stake, received by the investors, labeled pro rev payments as "other" than oil and gas production. (T. 825)
>
> (3) The tax summaries, mailed to investors for preparation of their tax returns, described the pro rev payments as funds from sources other than oil and gas production which did not qualify for a depletion allowance tax deduction. (Ex. RD 584-636)
>
> (4) The payout tables, included in the prospectuses, accurately described Home-Stake's development failures in prior programs which were contrary to the optimistic projections in other sales materials. (*Compare* Ex. RD 42, pp. 51-54 *with* Ex. RD 3 pp. 13-14; *compare* Ex. RD 41, pp. 18-21A *with* Ex. RD 1, pp. 12, 13; Ex. RD 27, pp. 51-56; Ex. RD 26, pp. 55, 56)

Furthermore, in December 1970, the SEC issued a formal Order of Investigation of the 1970 POC (Ex. RD 662) and, on February 11, 1971, filed a complaint in the district court charging Home-Stake, its officers and directors, and the 1970 POC with violation of the anti-fraud provisions of the federal securities statutes. (Ex. RD 657) In April 1971, the Final Judgment of Permanent Injunction was entered. (Ex. RD 659)

On April 30, 1971, the Rescission Offer Prospectus and a copy of the final judgment, describing the SEC fraud charges, were mailed to each of the investors in the 1970 POC. Two hundred seventy-nine (279) investors accepted the rescission offer and received the return of their investments, plus accrued interest. (Doc. 2577, ¶¶116, 117)

The 1971 Prospectus, effective November 3, 1971 (Ex. RD 27), and the 1972 Prospectus, effective October 11, 1972 (Ex. RD 26), also disclosed to the 1971 and 1972 investors details of the SEC fraud charges.

Six lawsuits were filed between June 1971 and January 1973 by various investors alleging that Home-Stake violated the anti-fraud provisions of the federal securities laws. (App. 45a n. 39)

On September 20, 1973, Home-Stake petitioned for reorganization under Chapter X of the Bankruptcy Act. Over $20,000,000 was distributed to the investors by the Trustee in the reorganization proceeding. (Doc. 2679, Ex. F) There never was an adjudication that Home-Stake was bankrupt. (T. 3477)

In addition to the Trustee's distributions, the investors actually received: (a) their promised tax benefits of over $42,000,000; (b) $12,000,000 in distributions from Home-Stake prior to the reorganization proceeding; and (c) over $29,000,000 from settlements. (Doc. 2679, Ex. F; Doc. 3163)

REASONS FOR DENYING THE WRIT

I. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT CERTIORARI REVIEW OF THE PETITIONERS' CLAIMS UNDER §27A OF THE 1934 ACT.

The petitioners' first basis for certiorari review is the post-judgment enactment of §27A. (Pet. 11) The application of §27A to this action does not present an important federal question and its review will not result in dispositive relief in petitioners' favor.

Petitioners do not and cannot claim a conflict among the circuits regarding §27A. Furthermore, there is no claim that the Tenth Circuit's decision so departs from the limits of normal judicial proceedings as to require this Court's supervision. The Tenth Circuit's January 6, 1992 order denying reinstatement contains no opinion interpreting or applying §27A and is not published. (App. 56a) Thus, that order applies only to the parties in this case and provides no precedent for other cases.

Petitioners incorrectly contend that application of §27A automatically requires reversal of the Tenth Circuit's judgment. (Pet. 11, 14) Instead, §27A imposes conditions on its application. First, §27A requires application of the "limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991." The

principles of retroactivity that existed on June 19, 1991, prior to this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991), required the satisfaction of three tests before a change in the law could be limited to nonretroactive application. These tests were established in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). Under §27A, the effect of *Lampf Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ___, 111 S.Ct. 2773, *reh'g denied*, 112 S.Ct. 27 (1991) on this case requires application of the three *Chevron* tests to the facts of this case.

Second, once a court has identified the limitation period appropriate under §27A, it must then examine the facts of the particular case to determine when the period began to run, i.e., when an investor first acquired either actual or constructive knowledge constituting inquiry notice of a basis for the claim. The court must then determine if the suit was timely filed. Therefore, the effect of §27A on §10(b) cases is not uniform. Rather, §27A's application depends on the facts of the particular case.

This case-by-case application of §27A means that appeals from decisions regarding its application will necessarily require a factual analysis of the particular record. Consequently, resolution of the issue in one case is not likely to provide precedent for other cases. Therefore, this case has little, if any, importance beyond the interests of its parties.

Issues of importance only to the parties in a case and not involving the resolution of conflicting appellate decisions or matters affecting the public generally, do not warrant certiorari review. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). Certiorari is not warranted to review conflicting evidence. *Id.* at 503.

The posture of this case does not support the petitioners' claim that §27A requires reversal of the Tenth Circuit's judgment. Unlike many cases decided on statute of limitation grounds, this case was tried on the merits. Respondents appealed to the Tenth Circuit on a complete trial record and raised several dispositive issues. One was that the action was time-barred by the very Oklahoma statute petitioners now claim must be applied under §27A. Another issue was whether the district court erroneously

excluded the tax and other benefits petitioners actually received from the computation of their "actual damages." *See Randall v. Loftsgaarden*, 478 U.S. 647 (1986). The value of these excluded benefits was more than double the actual damages computed and awarded by the district court (*see supra* at p. 5). (Doc. 2679, Ex. F)

Respondents briefed, argued, and submitted these and other issues to the Tenth Circuit prior to this Court's opinion in *Lampf*. With the benefit of the entire record and the arguments on all issues raised from that record, the Tenth Circuit, on three separate occasions, concluded that the judgments must be reversed and the actions dismissed. Thus, even if petitioners were correct regarding the effect of §27A, its application to this case provides no basis for certiorari review.

Various litigants in district courts have challenged the application, interpretation and the constitutionality of §27A.[3] However, there are no decisions by circuit courts of appeals on §27A, therefore, it is not presently ripe for this Court's review. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1949).

---

[3] Challenges, including respondents' objections to petitioners' pending Motion to Reinstate Section 10(b) Judgments in the district court, include constitutional claims that: (a) §27A operates as a legislative review of judicial action and accordingly violates the separation of powers clause of the Constitution, see e.g. *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872) and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); (b) §27A violates the principle that "the private rights of parties which have been vested by a judgment of a court cannot be taken away by subsequent legislation" (*Hodges v. Snyder*, 261 U.S. 600, 603 (1923); *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898)) and violates the due process clause by depriving defendants of vested property rights (*see e.g. Stewart v. Keyes*, 295 U.S. 403, *reh'g denied*, 296 U.S. 661 (1935)); (c) §27A violates the equal protection clause by creating an arbitrary and irrational classification (based on the differences in the laws existing on June 19, 1991 in the circuits which had adopted the *In re Data Access Sys. Sec. Litigation*, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988) rationale prior to that date), see e.g. *Zobel v. Williams*, 457 U.S. 55, 64 (1982) and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); and/or (d) §27A violates the supremacy clause (U.S. Const. art. VI cl. 2) by elevating a conflicting state statute of limitations over an established federal statute of limitation. It is respondents' position that the district court has no jurisdiction to consider petitioners' motion to reinstate since the Tenth Circuit, a higher court, has already denied relief on the identical issues.

II. PETITIONERS' SECOND QUESTION DEMONSTRATES NO CONFLICT AMONG THE CIRCUITS, IS BASED PRIMARILY UPON FACTUAL ISSUES AND PRESENTS NO IMPORTANT FEDERAL OR CONSTITUTIONAL ISSUES.

A. There Is No Conflict Among the Circuits.

The second question as stated is limited exclusively to the application of the one-year limitation period[4] of §13 to petitioners' §11 claims.[5] The petitioners erroneously contend that the Tenth Circuit's opinion is in direct conflict with *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979). (Pet. 18-19) Petitioners misconstrue *Robertson* to hold that inquiry notice cannot be triggered by a "wholly distinct fraudulent scheme." (Pet. i, 18-19) To the contrary, the same circuit, in *Arneil v. Ramsey*, 550 F.2d 774, 781 (2d Cir. 1977), held that media coverage regarding violations of the record keeping provisions of the securities laws was sufficient to constitute inquiry notice of another independent fraud. *Robertson* does not overrule *Arneil*. *Robertson* discusses fraudulent concealment of a single underlying fraud, not two independent, actionable frauds, and therefore is inapposite. *Robertson*, 609 F.2d at 593.

Now, for the first time, petitioners argue that only the second SEC fraud suit put them on inquiry notice of these claims. Prior to this petition, they argued that it was a Wall Street Journal article reporting Home-Stake's filing for reorganization which put them on inquiry notice. (Doc 2135A) Obviously, petitioners have changed the event that they claim triggered inquiry notice for purposes of arguing a perceived conflict with *Robertson*. Such a conflict does not exist.

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[4] Even though the petitioners do not raise the one-year time-bar to investors other than those in the 1970-1972 Programs, the §11 claims of the investors in the 1964-1969 Programs are time-barred by the three-year rule of §13. (App. 38a)

[5] At footnote 11 (Pet. 15-16), petitioners allude to the decision of the Tenth Circuit as establishing a "pernicious precedent" claiming that §9(e) requires actual discovery in contrast to §13 which is triggered by constructive discovery. The interpretation of §9(e) is not within the scope of the second question presented, therefore, respondents do not address §9(e) herein.

B. Petitioners' Second Question Is Based Primarily Upon Facts Properly Considered by the Tenth Circuit.

Factors such as market conditions, legal actions, or adverse or contradictory information are sufficient to place an investor on inquiry notice and to commence the limitation period. *See Gaudin v. KDI Corp.*, 576 F.2d 708, 712 (6th Cir. 1978), *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975), *Hupp v. Gray*, 500 F.2d 993, 996-97 (7th Cir. 1974), and *Arneil*, 550 F.2d at 781, all cited with approval in *Robertson*, 609 F.2d at 587- 89. Furthermore, newspaper articles may be considered in determining inquiry notice. *Kennedy v. Tallant*, 710 F.2d 711, 716 (11th Cir. 1983); *Berry Petroleum*, 518 F.2d at 410. Finally, investor sophistication is a significant factor to be considered with regard to events sufficient to constitute inquiry notice. *Arneil*, 550 F.2d at 781; *Jones v. Ford Motor Co.*, 599 F.2d 394, 399 (10th Cir. 1979).

Here, all of these factual elements supporting inquiry notice were in the record on appeal and were considered by the Tenth Circuit. It found, as a matter of law (App. 43a), that the investors in the 1970, 1971, and 1972[6] POCs were placed on inquiry notice by the following events more than one year before their §11 claims were filed: (1) on February 11, 1971, the SEC sued Home-Stake for fraud (App. 26a); (2) on February 16, 1971, the SEC fraud action was reported in the Wall Street Journal (App. 27a); (3) on April 30, 1971, the court-ordered rescission offer, which described the SEC fraud action, was mailed to the 1970 participants (App. 27a); (4) the 1971 and 1972 prospectuses described

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[6] The 1971 POC claims against Kothe & Eagleton and the 1972 POC claims were added by amendment on May 24, 1974, more than one year after the original complaint in this action was filed and, therefore, are time-barred. (App. 47a)

the SEC fraud action[7] (App. 43a n. 36); and (5) the 1970, 1971,[8] and the 1972 class representatives, all of whom were sophisticated investors, admitted knowledge of these facts (*see supra* at pp. 2, 4). (App. 43-46a)

The record before the Tenth Circuit demonstrated the petitioners' constructive knowledge of the alleged fraud, including, *inter alia*: 1) the inconsistencies between the prospectuses and the program books regarding income projections; 2) the check stubs and tax summaries which described pro rev as income other than from oil and gas production; and 3) the annual summaries of the status of the development in the prior programs which clearly demonstrated inconsistencies between Home-Stake's projections and actual development (*see supra* at pp. 3-4). Even if the petitioners were not placed on inquiry notice on the date of their investment as a result of the inconsistencies between the prospectuses and program books, they were on at least inquiry notice from the date they received the first check stub or tax summary which reported their income as being from other than oil and gas production.

The Tenth Circuit held that these facts collectively constituted " 'great glowering clouds'. . . sufficient to put plaintiffs on notice that something was amiss" and were "enough of a 'storm warning' to start the clock as a matter of law." (App. 43a, 47a) The Tenth Circuit recognized what the three class representatives knew and noted that each admitted that they "made their own decisions based as much on tax considerations as investment concerns." (App. 44-46a)

Petitioners also argue that constructive discovery could not have occurred prior to September, 1973. (Pet. 8) However, their

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[7] Petitioners argue that the Tenth Circuit's holding would result in the 1971 investors being on inquiry notice before their purchase, and the 1972 investors' claims being time-barred before their purchase. (Pet. 15 n. 10) They later concede that the Tenth Circuit held that statute of limitations starts on the purchase date. (Pet. 13, 17-18) When an investor has information sufficient to constitute inquiry notice prior to purchase, the statute of limitation begins to run on the date of purchase.

[8] Warren, the 1971 class representative, invested in all the Home-Stake programs from 1964-1972, and received the Rescission Offer, which he rejected. (App. 44a) He sold two units back to Home-Stake under his buy-back agreement in 1966 and 1967. (Doc. 2577 ¶19)

suit for fraud was filed on March 30, 1973, six months earlier. Petitioners' argument that constructive discovery could first occur after actual discovery is incredible. The unambiguous statutory language establishes that constructive discovery will commence the running of the one-year limitation of §13 for claims under §11 of the 1933 Act.

The existence of constructive discovery depends upon facts unique to each case. *Robertson*, 609 F.2d at 591. As this Court has recognized, it does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The question of when inquiry notice occurred is a fact-dependent issue peculiar to these petitioners, and this Court "does [not] sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

C. The Tenth Circuit's Decision Does Not Violate the Seventh Amendment.

Petitioners state that the Tenth Circuit's holding as to when inquiry notice occurred as a matter of law "flies in the face of common sense . . . and improperly invades the province of the jury." (Pet. 17) If anything "flies in the face of common sense," it is the jury finding that constructive discovery of the fraud could not have occurred prior to September, 1973, which ignores the fact that petitioners filed their securities fraud claims six months earlier.[9]

Petitioners attempt to defend the jury finding that the 1970-1972 class representatives "could not have discovered the facts . . . prior to September 1973," six months after the complaint was filed. (Pet. 14) Yet, numerous investors filed six lawsuits from June 1971 through January 1973 alleging violations by Home-Stake of the anti-fraud provisions of the federal securities laws. (App. 45a n. 39) The jury's finding is so clearly flawed that it was properly rejected by the Tenth Circuit as a matter

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[9] Petitioners mistakenly state that respondents did not challenge the jury instructions concerning the statute of limitations nor the form of the special jury interrogatories. (Pet. 20 n. 13) However, respondents objected to both at the trial (T. 4042.14-.16, 4042.28-.29) and appealed these statute of limitations issues (Appt. Joint Br. pp. 7-22).

of law. *Accord Lynch v. Universal Life Church*, 775 F.2d 576, 578-79 (4th Cir. 1985).

Based upon the whole record, the Tenth Circuit correctly concluded that "a single question of law predominates our review." (App. 24a) This Court has long recognized that "if the evidence is uncontradicted and raises only a question of law," there is no violation of the seventh amendment right to a jury trial when an appellate court reverses and directs entry of judgment. *Tull v. United States*, 481 U.S. 412, 419 (1987); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321-22, *reh'g denied*, 386 U.S. 1027 (1967).

There is no usurpation of a jury function nor is there a violation of the seventh amendment where the material facts are undisputed, and the court establishes, as a matter of law, that a statute of limitations bars the action. *Curry v. A. H. Robins Co.*, 775 F.2d 212, 217 (7th Cir. 1985).

The Tenth Circuit was correct in setting aside the jury findings, applying the standards of review set forth in *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 951 (10th Cir. 1978), because "both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion." *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943).

Petitioners state that the Tenth Circuit's opinion conflicts with "well established principles governing appellate review of jury verdicts in security (sic) law cases" (Pet. 19), citing *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984). However, *Mosesian* recognized that a statute of limitations question may be decided as a matter of law "when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Mosesian*, 717 F.2d at 877, citing *Kramas v. Sec. Gas & Oil, Inc.*, 672 F.2d 766, 770 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982). Petitioners have not and cannot identify a conflict among the circuits. The Ninth Circuit in *Mosesian* cited cases from the Sixth and Seventh Circuits holding that this question may be decided as a matter of law. 727 F.2d at 878. *Mosesian*

is distinguishable because the Ninth Circuit, in reversing the judgment notwithstanding the verdict, held that the verdict was "reasonable and [was] supported by substantial evidence." 727 F.2d at 879. The facts here do not support a similar conclusion.

The power of any court, trial or appellate, to direct entry of judgment notwithstanding a verdict, without violating the seventh amendment, is well established. *Neely*, 386 U.S. at 322. *See also* 5A J. *Moore, J. Lucas, Moore's Federal Practice*, ¶50.07[1] at pp. 50-61 through 50-64 (2d ed. 1992) and the citations therein. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 363-64, *reh'g. denied*, 369 U.S. 882 (1962) and *Robertson*, 609 F.2d at 592, cited by petitioners, are inapposite since the evidence relevant to the issue was controverted.

Here, notwithstanding the verdict, the Tenth Circuit found, as a matter of law, after a full review of the record, that the 1970, 1971, and 1972 claims were time-barred. (App. 47a) Its decision was proper. This Court has held that a court of appeals, in reversing the denial of a defendant's motion for judgment-notwithstanding the verdict, may itself order dismissal and direct entry of judgment for the defendant, citing to 28 U.S.C. §2106. *Neely*, 386 U.S. at 322. Respondents took all steps necessary to preserve the right to seek summary reversal of the district court's judgment by the Tenth Circuit. (Doc. 2534, 2537, 2546, T. 2976-78, 2982-95, 3003-08 - directed verdict motions; T. 3008 - motions denied; App. 60-75a, 78-146a, 60-75a - judgments; Doc. 2716, 2718, 2720 - JNOV motions).

Petitioners' second issue does not raise any legal question on the appropriate standard for judgment notwithstanding the verdict, nor does it raise a constitutional question. Instead, this issue is fact-based, i.e., whether a review of the record establishes that there are no material fact questions which would preclude an appellate court from entering judgment. Fact questions are not a basis for granting certiorari. *NLRB*, 340 U.S. at 503.

D. The Tenth Circuit's Holding Does Not Violate Congressional Policies.

The Tenth Circuit's holding does not subvert the policies of the federal securities laws or impede free access to the capital markets as petitioners suggest. The public policy issues raised by petitioners (Pet. 17-18), should be addressed to Congress, rather than to this Court, and they are not a proper basis for certiorari review.

Congress, by the enactment of §13, has stated the public policy to be that any fact (including an SEC fraud action) may be relied upon by a court to determine the date constructive discovery commences. Congressional policy establishes that the duty to diligently investigate remains with the investor, not the SEC.

The question of diligent investigation is determined on a case-by-case basis within that policy on statutes of limitations issues. The Tenth Circuit decision followed those policies. After *Lampf*, Congress had the opportunity to and did again address these policy considerations, but did not modify them in any way. S. 543, 102d Cong., 1st Sess. §1126 (1991).

III. THE DECISION OF THE TENTH CIRCUIT REGARDING §13 AND EQUITABLE ESTOPPEL IS NOT CONTRARY TO NOR IN CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUITS.

This Court and the various circuits uniformly define equitable estoppel as it relates to statutes of limitations to require proof that a plaintiff knew of a cause of action and, because of reliance upon a defendant's acts, failed to file the known cause of action in a timely manner. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n.7 (10th Cir. 1980); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988).

Petitioners misconstrue the distinction between equitable tolling and equitable estoppel. (Pet. 22) The difference is explained

in *Cerbone v. Int'l Ladies Garment Workers' Union*, 768 F.2d 45, 49-50 (2d Cir. 1985):

> Unlike equitable tolling, which is involved in cases where the plaintiff is ignorant of his cause of action because of the defendant's fraudulent concealment, equitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing his lawsuit (citations omitted).

The facts enumerated by petitioners do not support the application of equitable estoppel. Petitioners tacitly acknowledge that the facts of this case do not give rise to equitable estoppel. Petitioners deny knowledge of their claims until six months after the suit was filed, and, therefore, they could not have been fraudulently induced to forego filing a known claim.

Petitioners have never argued that they knew of their claims but delayed filing suit in reliance upon any acts or representations of the respondents. Rather, petitioners argue that the actions of some respondents prevented them "from discovering" their claims (Pet. 24), that quarterly payments from other than oil and gas production were made "to conceal the absence of program development and the lack of profitable operations" (Pet. 25), and that the rescission offer constituted an act of "concealment" (Pet. 26).

Petitioners argue facts which might be the basis for equitable tolling in an appropriate situation, but those facts do not support equitable estoppel. Equitable tolling, however, will not extend the three-year limitation period under §13. *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. Unit B 1981), *cert. denied sub nom, Arthur Young & Co. v. Summer*, 458 U.S. 1106 (1982); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir. 1982).

The Tenth Circuit correctly concluded that the 1964-1969 investors "were barred from suit by the three-year statute of repose" since the suit was not filed until March 30, 1973. (App. 39a) This conclusion is compelled by the plain language of §13 which states: "[i]n no event shall any such action be brought to enforce a liability created under section 11 . . . more than three

years after the security was bona fide offered to the public . . . ." The phrase "in no event" means what it says. *See Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391-92 (7th Cir. 1990), *cert. denied*, 501 U.S. ___, 111 S.Ct. 2887 (1991). This Court acknowledged the concept of §13 when it construed the three-year provision of §9(e) as a "period of repose" not subject to any "tolling principles." *Lampf*, 111 S.Ct. at 2781-82.

The Tenth Circuit's opinion is not in conflict with *Glus*, *Bomba v. W. L. Belvidere. Inc.*, 579 F.2d 1067 (7th Cir. 1978), *Katz v. Amos Treat & Co.*, 411 F.2d 1046 (2d Cir. 1969), or the other cases cited by petitioners. (Pet. 24 n. 17) Those cases each involved statements by defendants that caused the plaintiffs not to file suit, even though plaintiffs knew of their claims before the limitations period elapsed. The courts applied traditional standards of equitable estoppel.

It is indisputable that all circuits, which have considered the application of equitable estoppel to avoid the three-year limitation period of §13, have rejected the principle. *See Short*, 908 F.2d at 1391 (collecting cases). The Tenth Circuit's ruling is consistent with those decisions. (App. 32a n. 15, 38-39a) Furthermore, the Tenth Circuit accurately noted that the district court's decision (which is the same as the petitioners' contention before this Court) "is recognized in the treatises as the 'sole exception' to the three-year absolute bar under section 13." (App. 32a n. 15)

As *Glus* noted, the application of equitable estoppel is to be determined upon the facts of each case. 359 U.S. at 234. The Tenth Circuit correctly held upon the facts of this case, that respondents were not equitably estopped from asserting the statute of repose. The decision by the Tenth Circuit is consistent with *Glus* and with circuit decisions interpreting §13 and similar statutes of limitation.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JACK L. MCNULTY
THOMAS M. AFFELDT
SAVAGE, O'DONNELL, SCOTT,
MCNULTY, AFFELDT & GENTGES
601 S. Boulder, Suite 1100
Tulsa, OK 74119
(918) 599-9000
For E. M. Kunkel

JULIAN C. CAMPBELL
D. KENDALL GRIFFITH
NANCY G. LISCHER
HINSHAW & CULBERTSON
222 N. LaSalle Street, Suite 300
Chicago, IL 60601-1081
(312) 704-3000
For Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr.

B. HAYDEN CRAWFORD
Counsel of Record
ROBERT L. BAINBRIDGE
KYLE B. HASKINS
CRAWFORD, CROWE &
BAINBRIDGE, P.A.
15 East 5th Street, Suite 1714
Tulsa, OK 74103
(918) 587-1128
For Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr. and Cross and Company

STAN P. DOYLE
JAMES C. THOMAS
DOYLE & HARRIS
P.O. Box 1679
Tulsa, OK 74101
(918) 743-1276
For Kothe & Eagleton, Inc.

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(4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM H. DENNLER, *et al.*,

Petitioners,

v.

ROBERT S. TRIPPET, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WILLIAM A. WINEBERG, ESQ.
MICHAEL R. SIMMONDS, ESQ.
BROAD, SCHULZ, LARSON & WINEBERG
One California Street
San Francisco, CA 94111
(415) 986-0300

*PETER VAN N. LOCKWOOD, ESQ.
ALBERT G. LAUBER, ESQ.
JILL R. SHELLOW, ESQ.
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, DC 20005
(202) 862-5000

ELIHU INSELBUCH, ESQ.
CAPLIN & DRYSDALE, CHARTERED
10 East 53rd Street, 20th Floor
New York, New York 10022
(212) 319-7125

WILLIAM H. HINKLE, ESQ.
Suite 1100
320 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 584-6700

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF AUTHORITIES

CASES:	Page
Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301 (9th Cir. 1982)	9
Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir. 1980)	9
Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977)	6
Ayers v. Sutliffe, No. C-1-90-650, 1992 U.S. Dist. LEXIS 3219 (S.D. Ohio Feb. 11, 1992)	5
Bank of Denver v. Southeastern Capital Group, Inc., No. 90-B-1551, 1992 WL 59024 (D. Colo. Mar. 20, 1992)	5
Bankard v. First Carolina Communications, Inc., No. 89-C-8571, 1992 WL 3694 (N.D. Ill. Jan. 6, 1992)	5
Ceres Partners v. GEL Associates, 918 F.2d 349 (2d Cir. 1990)	2
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)	2
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)	8
Darms v. McCulloch Oil Corp., 720 F.2d 490 (8th Cir. 1983)	9
Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959)	9,10
Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)	9,10
Henley v. Slone, No. 91-9320, 1992 WL 52602 (2d Cir. Mar. 23, 1992)	2,5
In re Brichard Securities Litigation, No. C-87-2987-CAL (N.D. Cal. Mar. 27, 1992)	5
In re Data Access Systems Securities Litigation, 843 F.2d 1537 (3d Cir.) (*en banc*), *cert. denied*, 488 U.S. 849 (1988)	2
In re Melridge, Inc. Securities Litigation, No. 87-1426-JU, 1992 U.S. Dist. LEXIS 3477 (D. Ore. Mar. 20, 1992)	5

Table of Authorities Continued

	Page
Johnston v. CIGNA Corp., No. 90-B-177, 1992 WL 59022 (D. Colo. Mar. 20, 1992)	5
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991)	*passim*
Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979)	5,6,7
Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991)	2,8,9,10
Summer v. Land & Leisure, Inc., 664 F.2d 965 (5th Cir. Unit B 1981), *cert. denied*, 458 U.S. 1106 (1982)	9
TBG Inc. v. Bendis, No. 89-2423-O (D. Kans. Mar. 5, 1992)	5
TGX Corp. v. Simmons, No. 87-5298 (E.D. La. Mar. 13, 1992)	5
Venturtech II v. Deloitte Haskins & Sells, No. 88-1012-CIV-5-H (E.D.N.C. Feb. 24, 1992)	5
CONSTITUTION AND STATUTES:	
U.S. CONST., Amend. VII	8
Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m	7,8,10
Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)	1,3
Section 27A of the Securities Exchange Act of 1934, added by Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991)	*passim*
Interstate State Land Sales Full Disclosure Act, 15 U.S.C. § 1711 (1976) (amended 1979)	9
28 U.S.C. § 2403	5
MISCELLANEOUS:	
137 Cong. Rec. H11810-13 (daily ed. Nov. 26, 1991) (statements of Congressmen Dingell and Markey)	3

Table of Authorities Continued

	Page
137 Cong. Rec. S17315 (daily ed. Nov. 21, 1991) (statement of Senator Riegle)	3
137 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (statement of Senator Bryan)	2
Symons, *Pomeroy's Equity Jurisprudence*, §§ 802-805 (5th ed. 1941)	9

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REPLY BRIEF FOR THE PETITIONERS

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1. In our petition, we showed that Congress's enactment of Section 27A requires reversal of the court of appeals' judgment concerning the statute of limitations applicable in Section 10(b) actions, such as this one, filed prior to *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991). Respondents dispute this proposition (Br. in Opp. 5), contending that "§27A imposes conditions on its application" that assertedly permit the Tenth Circuit's decision to stand despite enactment of the new law. This contention is wholly without merit.

First, respondents assert that Section 27A's reference to "the principles of retroactivity" existing in the relevant circuit on June 19, 1991 supplies an alternative justification for the Tenth Circuit's result by requiring "application of the three *Chevron* tests to the facts of this case." Br. in

Opp. 6 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971)). Respondents oddly do not explain what the result would *be* under "the three *Chevron* tests." Their argument would thus be ineffective even if their construction of Section 27A were correct, which it is not.

In fact, the phrase concerning "principles of retroactivity" was included in Section 27A to cover cases from those circuits—the Second, the Third, and the Seventh—which had adopted a federal one-year/three-year rule before *Lampf, Pleva* was decided by this Court. *See In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.) (*en banc*), *cert. denied*, 488 U.S. 849 (1988); *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991). As the principal Senate sponsor of Section 27A stated:

> A number of courts had switched from a "borrowing" approach to a federalized and shortened statute of limitations, but had declined to apply the uniform federalized approach retroactively because of the obvious unfairness of doing so. In those circuits that had declined to apply the shortened [federal] statute retroactively, the courts would continue to be obliged to decline to apply the new rule [recognized in *Lampf*]. *That is the meaning of the phrase*[,] *"including principles of retroactivity."*

137 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (statement of Senator Bryan) (emphasis added). *See Henley v. Slone*, No. 91-9320, 1992 WL 52602 (2d Cir. Mar. 23, 1992) (interpreting "principles of retroactivity" as used in Section 27A). Because the Tenth Circuit had not adopted the federal one-year/three-year rule prior to this Court's decision in *Lampf, Pleva*, the "principles of retroactivity" language of Section 27A is irrelevant here. *See* Pet. 12-13 & n.7.[1]

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[1] Respondents' reading of this phrase would, not surprisingly, render Section 27A a virtual dead letter. Congress enacted Section 27A for the express purpose of making *Lampf, Pleva* nonretroactive in its

Second, respondents argue that application of Section 27A "will necessarily require a factual analysis of the particular record," including a determination "when the period [of limitations] began to run" (Br. in Opp. 6). We agree. Our petition therefore analyzed the record of this case and demonstrated that petitioners' Section 10(b) claims, considered under Section 27A, *are not time-barred* regardless of which date is chosen as the starting point for Oklahoma's two-year statute of limitations (Pet. 11-14). Respondents have not made the slightest effort to disprove, or even to contest, our demonstration of this point. Their abstract reference to the need for "a factual analysis" is thus a smokescreen, evidently masking an implicit concession that the Tenth Circuit has erroneously denied petitioners their rights under Section 27A.

Respondents next assert that, "even if petitioners were correct regarding the effect of §27A," "[t]he posture of this case" would somehow militate against review because other issues such as damages remain to be decided by the Tenth Circuit on remand should its statute-of-limitations ruling be reversed (Br. in Opp. 6-7). This assertion is confusing at best. Whenever this Court grants certiorari to review a threshold issue—be it jurisdiction, standing, or statute of limitations—the result may be a reversal and remand for consideration of other issues not decided by the court of appeals. The existence of such other unresolved issues has no logical bearing on the propriety of issuing the writ.

Finally, respondents cite the absence of any conflict in the circuits as indicating that this case is not yet "ripe" for this Court's review (Br. in Opp. 6-7). Given the unusual posture of this litigation—Section 27A was enacted after the court of appeals entered its decision, but before its

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application to Section 10(b) cases. *See* 137 Cong. Rec. S17315 (daily ed. Nov. 21, 1991) (statement of Senator Riegle); 137 Cong. Rec. H11810-13 (daily ed. Nov. 26, 1991) (statements of Congressmen Dingell and Markey). On respondents' view, the "principles of retroactivity" phrase would eviscerate this purpose by permitting the courts to hold *Lampf, Pleva* retroactive through application of the *Chevron* test.

decision has become final—it is unlikely that a circuit conflict could *ever* exist on the precise question presented here. But this Court routinely grants certiorari to permit reconsideration of appellate decisions in light of supervening legal developments—most commonly, where this Court itself has issued a decision that calls into question a result reached by a court of appeals. What prompts the grant of certiorari in such cases is not a circuit conflict, but the exercise of this Court's supervisory power and the overriding interests of justice, which mandate that cases be decided under the governing rule of law.

At bottom, respondents' assertions about "ripeness" are the third leg of a campaign to whipsaw petitioners by bringing about a situation in which *no court* can enforce the legislative mandate of Section 27A in this case. Respondents successfully urged the court of appeals not to recall its mandate for the purpose of reconsidering its opinion under Section 27A(a). Respondents contend that the district court is likewise precluded from granting reinstatement relief under Section 27A(b), for, as they acknowledge in a footnote (Br. in Opp. 7 n.3), "[i]t is [their] position that the district court has no jurisdiction to consider petitioners' motion to reinstate since the Tenth Circuit, a higher court, has already denied relief on identical issues."

In urging this Court, for supposed lack of "ripeness," also to deny relief, respondents in effect contend that no court should enforce the rule of decision that Congress has specifically enacted to cover cases such as this. That contention should be rejected, and certiorari should be granted to enable petitioners to receive a judicial hearing and a reasoned decision on the merits of their Section 27A claims.[2]

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[2] Respondents' litany of constitutional challenges to Section 27A (Br. in Opp. 7 n.3), all of which they have raised in the district court in response to petitioners' motion to reinstate, illustrates if anything the importance of this case. Indeed, respondents appear to be implicitly suggesting that the Tenth Circuit may have ruled in their favor *sub*

2.a. As to the second question presented, respondents' effort (Br. in Opp. 8) to harmonize the Tenth Circuit's ruling on "inquiry notice" with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), is wholly unpersuasive. Whether *Robertson* is characterized as involving fraudulent concealment of a single fraud or two independent frauds is immaterial. The key point is that the Second Circuit held in *Robertson* that the plaintiff's knowledge of an SEC action charging an issuer's underwriters with market manipulation of the issuer's stock did not constitute inquiry notice, as a matter of law, of a separate fraud committed in preparing the issuer's financial statements (609 F.2d at 592). In direct contradiction, the Tenth Circuit has held that petitioners' knowledge of an SEC action charging a narrow range of violations in connection with Home-Stake's 1970 program—

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silentio on one or more of the enumerated constitutional grounds, without briefing, argument or opinion and without notice to the Attorney General as required by 28 U.S.C. § 2403. Respondents evidently regard the Tenth Circuit's refusal to recall its mandate as a ruling on the merits concerning the applicability of Section 27A, for they assert that the court of appeals "has already denied relief on the identical issues" (Br. in Opp. 7 n.3) and has concluded "on three separate occasions" that petitioners' judgments must be reversed (*id.* at 7).

To petitioners' knowledge, there have been at least 22 district court decisions interpreting Section 27A to date. Of those decisions which have considered one or more of the constitutional issues raised by respondents, five have upheld the statute's constitutionality and four have ruled it unconstitutional. For constitutionality are *Bankard v. First Carolina Communications, Inc.*, No. 89-C-8571, 1992 WL 3694 (N.D. Ill. Jan. 6, 1992); *Ayers v. Sutliffe*, No. C-1-90-650, 1992 U.S. Dist. LEXIS 3219 (S.D. Ohio Feb. 11, 1992); *Venturtech II v. Deloitte Haskins & Sells*, No. 88-1012-CIV-5-H (E.D.N.C. Feb. 24, 1992); *TBG Inc. v. Bendis*, No. 89-2423-O (D. Kans. Mar. 5, 1992); *In re Melridge, Inc. Securities Litigation*, No. 87-1426-JU, 1992 U.S. Dist. LEXIS 3477 (D. Ore. Mar. 20, 1992). Against constitutionality are *TGX Corp. v. Simmons*, No. 87-5298 (E.D. La. Mar. 13, 1992), *Bank of Denver v. Southeastern Capital Group, Inc.*, No. 90-B-1551, 1992 WL 59024 (D. Colo. Mar. 20, 1992); *Johnston v. CIGNA Corp.*, No. 90-B-177, 1992 WL 59022 (D. Colo. Mar. 20, 1992); *In re Brichard Securities Litigation*, No. C-87-2987-CAL (N.D. Cal. Mar. 27, 1992). In *Henley v. Slone*, *supra*, the Second Circuit remanded a pending appeal to the district court for consideration of appellees' constitutional challenge to Section 27A.

all of which violations were purportedly cured in a later rescission offer (Pet. 16)—constituted inquiry notice, as a matter of law, to all 1970-1972 Program investors that Home-Stake and its subsidiaries were operating a wholly distinct fraudulent scheme involving the preparation and dissemination of false financial statements during 1964-1972.[3] The conflict between *Robertson* and this case is clear.[4]

b. Respondents' defense of the Tenth Circuit's holding that petitioners were put on inquiry notice of the Home-Stake fraud on April 30, 1971, by the mailing of the rescission offer (Br. in Opp. 9-11), is notable more for what it omits than for what it says. What is omitted is any attempt to refute petitioners' showing (Pet. 14-18) that a reasonable investor would have regarded the court-approved rescission offer as both identifying and curing the limited violations previously alleged by the SEC. Indeed, that is precisely what the jury determined in finding that petitioners lacked notice of Home-Stake's Ponzi scheme until September 1973.

Instead of confronting the Tenth Circuit's fundamental error in treating this issue as one of law, respondents argue disputed evidentiary points which were decided against them at trial and neither addressed nor relied upon

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[3] Respondents are disingenuous in contending (Br. in Opp. 8) that petitioners have changed their position as to the event—the second SEC suit against Home-Stake, as opposed to Home-Stake's bankruptcy filing—that triggered inquiry notice. Both events took place in September 1973; the bankruptcy filing resulted from settlement of the SEC action (T. 3472); and both events were reported in the Wall Street Journal several days apart (App. 28a; T. 1757, 1765-66). The jury did not determine which event put petitioners on inquiry notice, but simply found that petitioners could not have discovered the Home-Stake fraud "until September 1973" (App. 78a-146a).

[4] Respondents' citation of *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977), as somehow supporting the Tenth Circuit's decision here is wholly inapposite. In fact, by relying in part on the bankruptcy of the securities issuer as imparting notice to the plaintiffs, *Arneil* is consistent with the jury's selection of September 1973 as the notice date in this case.

by the court of appeals. For example, respondents' theory that petitioners gained "constructive knowledge" of the Home-Stake fraud from asserted inconsistencies between projections in program books and prospectuses, from information allegedly derivable from check stubs and tax summaries, and from a footnote in the 1971 prospectus (Br. in Opp. 3-4, 10), was rejected by the jury in answering special interrogatories (App. 78a-146a) and by the trial court in its order denying respondents' statute of limitations defenses (App. 57a-59a). Most importantly, the Tenth Circuit did not discuss, much less rely on, any of this "knowledge" in holding petitioners' 1933 Act claims time-barred by the one-year limitations period of Section 13.

Respondents attack as "incredible" the jury's finding that petitioners should not have discovered the fraud until September 1973, noting that the *Anixter* class action was filed six months earlier (Br. in Opp. 10-11). This is a red herring. As the Tenth Circuit noted, the primary issue is whether the *Anixter* complaint filed on March 30, 1973 is time-barred (App. 39a-40a, 47a), not whether September 1973 rather than March 30, 1973 is the appropriate notice date. There was no evidence at trial that any class representative or any member of the 1970-1972 investor classes (apart from Ivan Anixter himself) had knowledge prior to September 1973 of the filing of the *Anixter* action.[5] Thus, the jury's finding that the 1970-1972 class members should not have discovered their claims prior to September 1973 is both reasonable and consistent with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583, 586, 591-92 (2d Cir. 1979) (plaintiff's knowledge of and involvement in prior action not determinative on notice issue).

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[5] Ivan Anixter, the original named plaintiff in this case, voluntarily dismissed with prejudice his Section 11 claim against the only respondent affected by the issue whether March 30, 1973 or September 1973 is the applicable notice date (Doc. 2709). Similarly, there is no evidence in the record of knowledge by any class representative or class member of the six prior suits against Home-Stake referred to by respondents (Br. in Opp. 11) and the Tenth Circuit did not rely on those suits in support of its ruling (App. 45a).

c. Respondents concede that, under the Seventh Amendment, an appellate court may properly reverse a jury verdict only where the material facts and the inferences to be drawn therefrom are either undisputed or point so strongly in favor of the appellant that reasonable persons could draw no other conclusion (Br. in Opp. 12). Moreover, in reviewing the evidence, this Court has held that courts of appeal are "bound to view the evidence in the light most favorable to [the prevailing party below] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

Even if one assumes *arguendo* the reasonableness of the inferences that the Tenth Circuit, in ruling against petitioners, drew from the 1971 SEC action and ensuing rescission offer (Br. in Opp. 13), respondents make no effort to show that the contrary inferences urged by petitioners (Pet. 16-18) are not ones that a reasonable jury could *also* draw. Absent such a showing, the Tenth Circuit's holding on "inquiry notice" constitutes a clear violation of the Seventh Amendment and of this Court's standards for appellate review of jury verdicts.

3. As to the third question presented, respondents contend that the doctrine of equitable estoppel does not apply here because its application is confined to situations where a defendant fraudulently induces a plaintiff to fail to file a known cause of action in a timely manner (Br. in Opp. 14-15). In so arguing, respondents seek to defend the Tenth Circuit's ruling on a ground different from that upon which the court itself relied. The court of appeals held that equitable estoppel is unavailable *per se* in any Section 13 case (App. 38a), not that the facts of this case do not warrant its application.[6]

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[6] Respondents also assert (Br. in Opp. 16) that numerous circuits have rejected the application of equitable estoppel to Section 13, citing *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991). In fact, other than dictum in *Short* itself,

More importantly, neither respondents nor the authorities they cite suggest any reason why the principle behind equitable estoppel—"that no man may take advantage of his own wrong," *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-33 (1959)—should apply to revive a time-barred lawsuit where a plaintiff has been lulled into letting the statute of limitations run on a known cause of action, yet not apply where the plaintiff's failure to file a timely suit was procured by the defendant's active fraud in keeping the plaintiff ignorant of the relevant facts. In both situations the defendant has fraudulently obtained the benefit of a time bar by conduct separate and apart from the acts that gave rise to the original cause of action. Indeed, the defendant's fraud in the latter case is more egregious: by keeping plaintiffs in the dark about the very *existence* of their cause of action, the defendant absolutely deprives them of any opportunity to sue. Neither the Tenth Circuit in this case nor the Seventh Circuit in *Short* has proffered any principled basis for invoking equitable estoppel in the circumstances presented by *Glus*, yet not invoking that doctrine in circumstances like those here, which include a calculated pattern of fraud on both the SEC and the district court which issued the 1971 consent injunction against Home-Stake, as well as on petitioners. *Compare Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944) (vacating final judgment for fraud on the Patent Office and on the court of appeals).[7]

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none of the cases cited in *Short* involved the application of equitable estoppel in a Section 13 action. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1308 (9th Cir. 1982) and *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. Unit B 1981), *cert. denied*, 458 U.S. 1106 (1982), both involved equitable tolling not equitable estoppel. And *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) and *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n.7 (10th Cir. 1980), interpreting the substantially identical three-year limitations period contained in the Interstate State Land Sales Full Disclosure Act, 15 U.S.C. § 1711 (1976) (amended 1979), stated that equitable estoppel could apply in a proper case.

[7] *See* the discussion of the breadth of the equitable estoppel doctrine in Symons, *Pomeroy's Equity Jurisprudence*, §§ 802-805 (5th ed. 1941).

This Court should grant certiorari to make clear that its decisions in *Glus* and *Hazel-Atlas* are not so limited.

CONCLUSION

For these reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM A. WINEBERG, ESQ.
MICHAEL R. SIMMONDS, ESQ.
BROAD, SCHULZ, LARSON & WINEBERG
One California Street
San Francisco, CA 94111
(415) 986-0300

*PETER VAN N. LOCKWOOD, ESQ.
ALBERT G. LAUBER, ESQ.
JILL R. SHELLOW, ESQ.
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, DC 20005
(202) 862-5000

ELIHU INSELBUCH, ESQ.
CAPLIN & DRYSDALE, CHARTERED
10 East 53rd Street, 20th Floor
New York, New York 10022
(212) 319-7125

WILLIAM H. HINKLE, ESQ.
Suite 1100
320 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 584-6700

*Counsel of record.

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The necessity for fraudulent acts by a defendant that are separate and apart from the initial misrepresentations in the sale of a security is the answer to the Seventh Circuit's rhetorical question about the necessity for the three-year bar to be absolute. *See Short*, 908 F.2d at 1391, quoted at App. 38a. Where the one-year period of Section 13 has not run because the plaintiff has no basis for discovering a misrepresentation or omission, the three-year statute of limitations will protect any defendant who has not actively and fraudulently concealed the misrepresentation or omission.